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Supreme Court, U.S.
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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

JUDE R. HAYES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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November 24, 1986

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QUESTION PRESENTED

Should this Court review the Ninth Circuit's split decision approving the broadest search warrant of medical records ever approved by a federal court, a warrant which—based on suspicion that some 58 named patients of a medical doctor may have received excessive prescriptions of specific Schedule II medication—authorized agents to rummage as they wish through the medical files of *all* patients, and to seize at their own sole discretion *any* file in which *any* controlled medication had ever been prescribed, and which another federal district court judge found overbroad and which the prosecutor acknowledged on appeal was a "mistake" attributable to sloppy work in his office?

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OPINIONS BELOW

This petition seeks review of a decision of a divided panel of the United States Court of Appeals for the Ninth Circuit (per Wallace, J., and Anderson, J.; Pregerson, J., dissenting), not yet reported, which is reprinted in the Appendix to the Petition for Certiorari.[1] The opinion of the United States District Court for the Eastern District of California (Coyle, J.) denying petitioner's motion to suppress, not reported, is also reprinted in the Appendix, as is the decision of the United States District Court for the Eastern District of California (Price, J.) in the related civil suit,

[1] The opinion of the Court of Appeals, filed on May 9, 1986, was withheld for publication until September 30, 1986. Citations to the Appendix filed with this Petition will be denoted "App. ____". Citations to the Excerpt of Record submitted to the court of appeals will be denoted "ER____".

holding the warrants which are the subject of this petition for review unconstitutional.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on May 9, 1986. The petition for rehearing was denied on October 1, 1986. This Court has jurisdiction to review the judgment of the court of appeals under 28 U.S.C. section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment IV of the Constitution of the United States provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

The issue in this case is whether government agents, based at most on suspicion that some 58 named patients of a medical doctor may have received excessive prescriptions of specific Schedule II medication, are entitled to rummage as they wish through the medical files of *all* his patients, and to seize at their own sole discretion *any* file in which *any* controlled medication had ever been prescribed by that doctor or any of the other doctors with whom he practiced. For the warrant approved by the divided Ninth Circuit panel below authorized just such a search and standardless seizure more extreme, unnecessary, and intrusive than any ever approved by this or any lower federal court.

A. The Issuance of the Warrants

The three warrants whose overbreadth is challenged in this case were issued on July 28, 1982, after government agents learned

that some 58 patients of Doctor Jude R. Hayes—less than 1% of his practice—may have received what they considered to be excessive prescriptions of Schedule II medications. Dr. Hayes is a distinguished physician who has practiced medicine for 28 years and treats patients in offices in Porterville, Farmersville, and Ivanhoe, California. As a physician, Dr. Hayes is entitled under the "medical exception" to the Controlled Substances Act to prescribe controlled medications to his patients. The evidence arousing government suspicion in no way suggested that he issued such prescriptions on demand or invented complaints for his patients, as do the "script" doctors who are the target of this Act's prohibitions.

Indeed, the prosecutor conceded in his closing argument to the jury that Dr. Hayes was not a "script doctor." ER 642. Rather, the evidence concerned some 58 specific patients as to whom the Government claimed that Dr. Hayes' prescription of Schedule II medications—which are approved by the Food and Drug Administration as medically appropriate for the treatment of pain—might have been "excessive."[2]

The warrants were not limited to records concerning the 58 patients. Nor were they limited to records concerning patients being treated for pain, or patients being prescribed Schedule II medications. They were not even limited to records concerning those patients primarily treated by Dr. Hayes, as opposed to the other nine physicians and three family nurse practitioners who worked in his offices. Rather, the warrants authorized agents to search for and seize:

> (1) demerol (mependine), morphine sulfate and other controlled substances; (2) all records which document the purchasing, dispensing and prescribing of controlled sub-

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[2] The standard of "excessive" prescriptions which was applied by the Government's expert is an administrative standard applied by state licensing authorities; it is nowhere mentioned in the Controlled Substances Act, and petitioner has vigorously contested the government's efforts through this case to convert what is at worst a difference of opinion within the medical community as to the treatment of chronic pain into a basis for criminal liability.

stances, including but not limited to records contained in patient charts and all relevant records required to be maintained by Title 21 of the Code of Federal Regulations, Part 1300 to end and Sections 11190 and 11191 of the California Health and Safety Code; (3) patient logs, appointment books and other records and ledgers reflecting distribution of controlled substances;[3] (4) correspondence concerning the procuring, transferring, administering, prescribing or dispensing of controlled substances by Dr. Hayes; all of which constitute evidence of possible violations of 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 843(a)(3).

On their face, the warrants authorized the search of every file and every record of every one of the 10,000 patients treated in any one of Dr. Hayes' offices by any of the physicians in those offices. They authorized the seizure of any record involving controlled substances, including any prescription of any of the hundreds of controlled medications occasionally prescribed for millions of Americans—from Valium to Librium to Tylenol with codeine. Nothing in any of the three warrants gave the agents executing them the slightest guidance as to how to distinguish records involving the potentially illegal distribution of controlled substances from records with absolutely no bearing on illegal distribution at all. No standards were set forth telling the agents what degree of frequency or quantity would indicate that a record might be linked to prescriptions exceeding the law. No guidelines were stated as to what symptoms or diagnosis might justify what dosage of which medication.

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[3] The Farmersville and Porterville warrants authorized the seizure of such records "constituting evidence of illegal distribution of controlled substances," thus requiring the officers to determine—without any guidance from the warrant—whether a particular item constitutes evidence of illegal rather than legal distribution. See App. 108,114 (Pregerson, J., dissenting). The Ivanhoe warrant included no such limitation, thus allowing for the seizure of evidence which was not even probable evidence of any illegal activity.

B. The Execution of the Warrants

The three search warrants were executed the following day by three teams totaling altogether twelve agents—one team searching and seizing documents in each of Dr. Hayes' three offices. In the Porterville office, where the records of six to eight thousand patients were maintained by Dr. Hayes and his colleagues, a five-person team began searching all of them, "starting at one end." ER 280, 300. According to Agent Plavan, the agent in charge, anything within the confines of the office was "fair game" for the search. ER 424.[4] The determination of what to look for and seize was "up to the discretion of the officer"; it "was basically assumed each officer was to use his common sense and judgment as to which files should be seized." ER 424, 421. While the agents "initially had planned to go through each and every file in the office," it became "obvious" within the first four hours that the full search and seizure authorized by the warrant could not be completed "unless we stayed there for two or three weeks." ER 300. At that point, the officers decided to limit their search in a discretionary manner to 75 patients for whom drug profiles had previously been developed and to the triplicate prescription log maintained by Dr. Hayes for Schedule II prescriptions. ER 301, 424.

In the Farmersville office, where 1200 to 1500 patient files were kept, a three-person team reviewed each and every one, as well as all appointment books and ledgers. ER 332, 388. Agent Horn, the team leader, testified that they were particularly looking for charts evidencing Schedule II abuse, but that "there was really no convenient way for us to set out a particular manner" of defining abuse, so that he and the other agents operated with no specific standards as to amount or frequency of prescriptions. ER 387.

In the Ivanhoe office, a four-agent team searched each of some 1,000 files in the office, with each agent making his own decisions as to what to seize. Agent Conner, the team leader, acknowledged

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[4] It was not only medical files that were examined. The agents searched through confidential legal files in a locked file cabinet in a separate conference room, and through the briefcase of a financial consultant who happened to be present. ER 177-179, 182; App. 17.

that most of the agents involved in the search had limited if any experience with physicians' prescribing practices, but stated that they were nonetheless given no specific guidelines as to what to seize. So long as "it fit the guidelines of the warrant," a file could be seized if it might warrant further review. ER 406.

All told, Agent Conner testified that 217 medical files were seized by the 12 officers who each spent all day searching Dr. Hayes' offices. Of those, 18 included no prescriptions for any controlled substances at all, and somewhere between one-quarter and one-half included no prescriptions for Schedule II medications. ER 412-413.

C. Challenges to the Warrants Below

Following the searches of his offices, petitioner brought suit in the United States District Court for the Eastern District of California seeking return of his records. The District Court, in an opinion by Judge Price, concluded that while there was probable cause for the issuance of *a* search warrant, there was no probable cause for the issuance of a search warrant "of the all-encompassing breadth and scope of the instant warrant." App. 23. Noting that the "most usual remedy for Fourth Amendment violations is the suppression of evidence in the criminal proceeding," Judge Price ordered the return of all seized evidence by February 1, 1983, unless the plaintiff was indicted prior to that time. Dr. Hayes was indicted on January 28, 1983.

In the criminal proceeding in the same district court, but before a different judge, petitioner sought suppression of the seized evidence. In denying that motion to suppress, Judge Coyle apparently agreed with Judge Price that the warrant standing *alone* was overbroad. Judge Coyle refused suppression instead on the basis that government affidavits had described a narrower range of documents than did the warrants—even though those affidavits were never attached to the warrants, and even though, as Judge Coyle acknowledged, the "general rule" is that affidavits cannot correct excessive generality in warrants to which they were never attached. The evidence was introduced at trial, and Dr. Hayes was convicted of violating the Controlled Substances Act with respect to prescriptions issued to twelve of his patients.

On appeal, the Ninth Circuit affirmed the denial of suppression, and affirmed the convictions. None of the three judges on the panel, however, agreed with Judge Coyle's novel argument that the unattached affidavits could supply the particularity that was missing from the warrant. Rather, the two judges in the Ninth Circuit majority upheld the search and seizure solely on the basis that the *warrants themselves* satisfied the particularity requirement of the Fourth Amendment. The only reason offered by the majority was its conclusion that the magistrate, based on the 58 suspect cases, had somehow found probable cause to search and seize *all* records of *all* patients for *any* prescription of *any* controlled medication, in *any* amount and with *whatever* degree of frequency. From this conclusion, the court below apparently reasoned that no limits at all on the scope of the search or the discretion of the officers were necessary.

Judge Pregerson dissented, finding that the actions of federal authorities "demonstrate a cavalier disregard for the Fourth Amendment's particularity requirement." App. 105. The warrants used were characterized by "flagrant overbreadth," App. 107, and "do not even come close to satisfying the Fourth Amendment's particularity requirement." App. 116. The warrants mandated that the agents determine without any standards whether a particular item constitutes evidence of illegal distribution, an inquiry which is "especially problematic" because Dr. Hayes was legally entitled to prescribe controlled medications, so long as those prescriptions were not "excessive" or for a "non-medical" purpose. App. 108 n.3. The overbreadth of the warrants "not only permitted discretionary rummaging and seizure, but in fact necessitated it," a result which should not be tolerated given that "the search could have been, but was not, restricted to the files pertaining to the particular patients or drugs referred to in the affidavits." App. 110, 115. Moreover, Judge Pregerson found that the failure to limit the warrants was "particularly troublesome" because the documents were primarily patients' medical records: "Information contained in patient files is extremely personal and potentially embarrassing to innocent third parties." App. 112.

Judge Pregerson, while alone in dissent below, was not alone in viewing the warrants as overbroad. While neither of Judge

Pregerson's colleagues took this view, the Assistant United States Attorney assigned to this case himself admitted at length at oral argument that the failure to limit the warrants was a "mistake," attributable only to sloppy work in his office. As Judge Pregerson details:

> At oral argument, the United States attorney assigned to this case repeatedly acknowledged that the failure to limit the search warrants to records involving Schedule II drugs or specific patients was a "mistake" on the part of the agents who drafted the warrants. Government counsel conceded that "in hindsight" the warrants should have been limited to the suspect patient files referred to in the affidavits.
>
> This error was apparently due to counsel's failure adequately to assist the agents in drafting the warrants. Counsel noted that the agents typed up the warrants and affidavits and that he failed to review them before they were presented to the magistrate because "for some reason I was not available." He further acknowledged that his failure to review the warrants was a departure from "customary practice."
>
> Thus, although the attorney asserted that he assisted in preparing the affidavits and warrants, it appears that he did not give the agents meaningful guidance on how the documents should be worded. In fact, counsel candidly admitted that, "I was quite surprised that [the warrant] ended up reading the way it did."

App. 105 n.1. The issue in this case is not whether two judges of the Ninth Circuit can forgive these mistakes; it is whether the Fourth Amendment to the Constitution can tolerate them.

REASONS FOR GRANTING THE WRIT

The warrants approved below all but eliminated the Fourth Amendment's particularity requirement, permitting government agents to rummage at will among the intimate medical records of nearly 10,000 patients. For all that appeared on the face of the warrants, the only thing these patients could have been accused of doing was seeking their doctor's advice. The decision below

tolerating this flagrantly general search imperils all businesses and professional practices, who now must beware, at least in the Ninth Circuit, that a small tail of "suspicion"—here as to 1% of the patients in a doctor's extensive, 28-year, tricity practice—may wag the entire dog. To be sure, the decision below adds one more approach to the struggles of the circuits to fashion rules for the sweep of general business records searches. But those piecemeal and inconsistent struggles cry out for authoritative guidance from this Court.

Even if the particularity and probable cause requirements were not deemed to prohibit a general search of 10,000 patient records based, at most, on suspicion as to 58, review would nonetheless be required in this case. For the warrants upheld below authorized not only a general search, but also utterly standardless seizures in flat violation of this Court's insistence that, "as to what is taken, nothing is [to be] left to the discretion of the officer executing the warrant," *Marron v. United States,* 275 U.S. 192, 196 (1927).

I

THE DECISION BELOW DRAMATICALLY EXPANDS THE EXPOSURE OF BUSINESSES AND PROFESSIONAL PRACTICES TO GENERAL, EXPLORATORY SEARCHES.

The government in this case knew the names of the 58 patients whom it suspected had received excessive prescriptions of Schedule II medications. Rather than limiting itself to a search for the files of those 58 patients, the Government sought and received the authority to conduct a sweeping exploratory search in Dr. Hayes' three offices in the hopes of collecting evidence of some other wrongdoing.[5] Ignoring the requirements of probable cause and

[5] Petitioner has never conceded even that the government had probable cause to search for those 58 files, based on no more than a conclusion that the prescriptions issued might have been "excessive"—a standard which has been applied by California authorities in licensing proceedings but had never, at least until this case, been considered the standard for criminal penalties under federal law. But the government's choice not to

particularity, the government sought and received permission to conduct nothing less than the very sort of "general, exploratory rummaging," *Coolidge v. New Hampshire,* 403 U.S. 443, 467 (1971), that the Fourth Amendment's requirements of probable cause and particularity were intended to make "impossible," *Marron v. United States,* 275 U.S. 192, 196 (1927).

The Ninth Circuit not only approved such a general search in the case below; it did so in circumstances where a narrower targeting was entirely possible—as the prosecutor acknowledged—and the records at issue peculiarly private in nature. At a minimum, this decision compounds the confusion and disparity that has developed among the circuits over the constitutionality of business records searches in the decade since this Court's decision in *Andresen v. Maryland,* 427 U.S. 463, 479 (1976). At worst, it authorizes a search that takes the generality sometimes tolerated by some lower courts to dramatic new heights.

Andresen involved warrants that, after an "exhaustive list of particularly described documents" relating to the crime of false pretenses with respect to a certain lot (Lot 13T) in a stated development (Potomac Woods), included the phrase "together with other fruits, instrumentalities and evidence of crime." This Court concluded that the warrants did not authorize an unconstitutionally general search, but only in light of their implicit reference to the highly particularized descriptions found earlier in the warrant. The Court wrote that the final phrase "*must* be read as authorizing *only* the search for and seizure of evidence relating to 'the crime of false pretenses with respect to Lot 13T' . . . The warrants, accordingly, did not authorize the executing officers to conduct a search for evidence of other crimes but only to search for and seize evidence relevant to the crime of false pretenses and Lot 13T." 427 U.S. at 480-82 (emphasis added).

Andresen should have made clear that probable cause to believe there is particular evidence of particular wrongdoing cannot constitutionally be translated into a warrant to rummage through all of a person's papers and effects in the hopes of finding

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restrict its search and seizure to those 58 patients renders the question of probable cause as to them wholly academic.

other, unknown evidence of other, unknown crimes. But in the decade since *Andresen,* what began as a limited exception to the particularity requirement has expanded in this case so as to threaten the Constitutional rule.

At least two circuits, including the Ninth before this case, have sought to limit approval of general warrants for searches of business records to cases where there is particularized reason to suppose a search will turn up "pervasive" evidence of crimes, or where the evidence sought of illegal activity cannot be segregated in advance by any standard from nearby innocent records. In *United States v. The Offices Known as Fifty State Distributing Co.,* 708 F.2d 1371 (9th Cir. 1983), the court held that an affidavit suggesting a pervasive scheme of fraudulent activity was sufficient to justify a search of and seizure of all of a business' records. In doing so, the court then emphasized that while the search and seizure was "extraordinarily broad, and in this sense 'general' . . . [i]t was not possible through more particular description to segregate those business records that would be evidence of fraud." A similar argument was accepted by the Court of Appeals for the First Circuit in *United States v. Brien,* 617 F.2d 299 (1st Cir.), *cert. denied,* 446 U.S. 919 (1980). The following year, however, that court as well made clear that such broad searches and seizures would be tolerated only where it was impossible to segregate legitimate activity from fraudulent activity. *United States v. Roche,* 614 F.2d 6 (1st Cir. 1980).

But such creative glosses on the Fourth Amendment's straightforward particularity requirement have not been universally endorsed. In *Voss v. Bergsgaard,* 774 F.2d 402 (10th Cir. 1985), for example, the government secured a warrant to search a company's three offices based on allegations of a scheme of tax fraud. In holding the warrant unconstitutionally overbroad, the court emphasized that it authorized agents "to rummage through all of the [company's] customer files, bank records, employee records, precious metal records, marketing and promotional literature, and more, seeking any information pertaining to any federal crime." These warrants, the court concluded, "allowed precisely the kind of rummaging through a person's belongings, in search of evidence of even previously unsuspected crimes or of no crime at all,

that the fourth amendment prohibits." *Id.* at 405. To the extent that *United States v. The Offices Known as Fifty State Distributing Co.*, and *United States v. Brien* suggested an opposite result, the Tenth Circuit specifically declined to follow those cases. *Id.* at 406. See also *United States v. Bright*, 630 F.2d 804, 812 (5th Cir. 1980) (upholding generic classifications in warrant where more precise description not possible); *United States v. Gomez-Soto*, 723 F.2d 649, 652-54 (9th Cir.), *cert. denied*, 104 S.Ct. 2360 (1984) (upholding warrant to the extent it related to criminal activity that was the sole business of defendant, and striking down remainder of warrant as overbroad); *Montilla Records of Puerto Rico v. Morales*, 575 F.2d 32 (1st Cir. 1978) (striking down warrant as unnecessarily broad); *In re Grand Jury Proceedings*, 716 F.2d 493, 499 (8th Cir. 1983) (striking down warrant for exceeding limits of probable cause); *In re Lafayette Academy*, 610 F.2d 1 (1st Cir. 1979) (striking down warrant as overbroad and standardless).

In short, *Andresen* left in its wake uncertainty about the circumstances in which general exploratory searches of business records may be constitutionally tolerable, and the circuits have spawned confusion and disparity in that wake. That confusion calls out for uniform guidance from this Court.

This case provides a particularly appropriate vehicle for such clarification because the government's wholesale rummaging through Dr. Hayes' offices was far more extreme than any search countenanced in the cases just described. First, there was no basis to suspect "pervasiveness" here as there was found to have been in *Fifty State Distributing*. If suspicion as to less than 1% of a doctor's practice is sufficient to give rise to a fishing expedition through records concerning all 10,000 patients—as even the prosecutor could not justify—then the very notion of "pervasiveness" loses all meaning, and suspicion as to *any* criminality is sufficient to justify general rummaging. Faced with facts in many respects identical to this case—a search of doctors' offices based on some 50 suspected cases of fraudulent overbilling—the Court of Appeals for the First Circuit held similar warrants to violate both the probable cause and the particularity requirements of the fourth amendment. *United States v. Abrams*, 615 F.2d 541 (1st

Cir. 1980). As that court properly recognized, "were we to hold the search in this case to be justified by the affidavit [pointing to 50 suspected cases], we can see no basis for invalidating in a future case a search and seizure of all records of payables and expenditures relying on an affidavit that some unspecified percentages of a business's expenditures exceeded the relevant bills payable." *Id.* at 544 n.7.

Second, what is involved here is not simply records of business activity, but the most private and personal and embarrassing kind of records. As Judge Pregerson recognized:

> The failure to limit the warrants so as to minimize intrusions upon patient's privacy interests is particularly troublesome because the documents to be searched were primarily medical records. Information contained in patient files is extremely personal and potentially embarrassing to innocent third parties. Unlike the cases cited by the majority, in which the searches generally involved a narrow class of business transactions, the search in this case encompassed personal medical history contained in thousands of patient files. The Magistrate's failure to narrow the scope of the search resulted in massive intrusions on personal privacy interests.

App. 112-113. This Court should review the judgment below in order that the exposure of any business or professional practice to general, rummaging searches will no longer depend on the accident of its location in one federal circuit or another.

II

EVEN IF GENERAL, EXPLORATORY SEARCHES WERE CONSTITUTIONAL, THE DECISION BELOW ALLOWS UNBRIDLED DISCRETION TO SEIZE PRIVATE PAPERS REGARDLESS OF PROBABLE CAUSE.

Even if the agents were constitutionally entitled to *search* all 10,000 of the medical files in petitioner's offices, the constitutional question remains as to what they were entitled to *seize*. "As to what is to be taken, nothing is [to be] left to the discretion of the officer executing the warrant." *Marron v. United States*, 275 U.S. at 196.

Until this decision, the Court of Appeals for the Ninth Circuit, like every other Court of Appeals, had ensured the absence of such prohibited discretion by requiring "objective, articulated standards for the executing officers to distinguish between property legally possessed and that which is not." *United States v. Hillyard*, 677 F.2d 1336, 1340 (9th Cir. 1982). See also *United States v. Cardwell*, 680 F.2d 75, 78 (9th Cir. 1982); *United States v. Marti*, 421 F.2d 1263, 1268 (2d Cir. 1970), *cert. denied*, 404 U.S. 947 (1971); *In re Lafayette Academy*, 610 F.2d 1 (1st Cir. 1979); *United States v. Cook*, 657 F.2d 730 (5th Cir. 1981). That requirement was abandoned in this case.

Two of the warrants demanded discretion on their face. The warrants covering more than 9,000 files in the Farmersville and Porterville offices authorized the seizure of those patient logs and records "constituting evidence of illegal distribution of controlled substances." But neither of these warrants contained so much as a single guideline, in terms of frequency or dosage or patient condition, as to what constitutes illegal rather than legal distribution.

Nor is it a simple matter to distinguish between legal and illegal distribution of all controlled substances by a physician. All of the medications listed in Schedules II-V of the Controlled Substances Act have recognized, legitimate medical uses. The government itself has estimated that one in four adult Americans uses stimulants, sedatives, or tranquilizers encompassed in these schedules during a year. And this 25% figure does not include the use of other controlled substances—such as paregoric, Demerol, Tylenol with codeine, or codeine cough syrup—which are commonly, legally prescribed medications.[6]

Yet even apart from the specific language of the warrants, which the majority of the panel simply chose to ignore, see App. 99, 101, 103 n.1, 104 n.3, discretion was a necessity. The breadth of the searches authorized and the number of medical files involved left the agents no alternative, and the terms of the

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[6] See White Paper on Drug Abuse: A Report to the President from the Domestic Council Drug Abuse Task Force (Government Printing Office, 1975).

warrants admittedly provided them no guidelines. As one agent put it, everything was "fair game," with the decision whether to search and seize a particular file "up to the discretion of the individual officers." ER 423-424.

Such unbridled discretion is more offensive still given the nature of the search involved. The requirement of specificity in a warrant is particularly exacting where the search is of a person's papers, for "there are grave dangers inherent in executing a warrant authorizing a search and seizure of a person's papers that are not necessarily present in executing a warrant to search for physical objects whose relevance is more easily ascertainable." *Andresen v. Maryland,* 427 U.S. at 482 n. 11. And if that is so as to the business records at issue in *Andresen,* it is even more compelling where the records involve not matters of business but of individual health, and where the determination of relevance must turn on an officer's lay evaluation of the medication that individual needed to deal with illness.

The majority's only justification for this wholesale grant of discretion is to claim that since the magistrate's finding, "unchallenged on appeal," was of probable cause to seize "all documents concerning controlled substances," there was no need for any guidelines. That assertion, however, wholly misunderstands not only petitioner's argument on appeal but the very law of probable cause and particularity under the Fourth Amendment.

First, appellant never conceded that there was probable cause to search 10,000 patient files for any and all controlled substances. Quite the contrary, as appellant argued in his main brief to the Court of Appeals: "Here, as Judge Price held [in the initial civil suit], the government *did not* have probable cause to search all of Dr. Hayes' papers, files and records in all of his offices. At most, the government had reason to suspect, on the basis of an investigation which covered more than 5,000 prescriptions at 15 pharmacies, violations with respect to less than one percent of Dr. Hayes' patients. See *United States v. Abrams,* 615 F.2d at 544 n.7." Brief for Appellant at 41 and n.42.

Second, even apart from these specific assertions, the claim that these warrants were unconstitutionally general necessarily

encompasses a claim that they were unsupported by probable cause. What made the description in these warrants "general" as a matter of law was precisely the fact that they encompassed patients and medications as to which the government lacked the particularized suspicion required by the Fourth Amendment. The warrants constituted nothing less than a blank check to the constable to search at will for unknown and undescribed evidence of crime.

Third, however general the search, the Fourth Amendment limits seizures of property to items which are at least probable evidence of illegal behavior. "There must, of course, be a nexus—automatically provided in the case of fruits, instumentalities or contraband—between the item to be seized and criminal behavior. Thus in the case of "mere evidence," probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction." *Warden v. Hayden*, 387 U.S. 294 (1967). The majority in this case flatly ignores that requirement. It upholds possible seizure of any record with any legal prescription for Tylenol with codeine—and then converts this vice of the warrants into a virtue which makes standards unnecessary. In order to eliminate the need for standards to distinguish between legitimate and illegal prescriptions, the majority violates the Supreme Court's requirement of a nexus between the evidence and illegal behavior.

In *In re Grand Jury Proceedings*, 716 F.2d 493 (8th Cir. 1983), the Government sought to persuade the Court of Appeals for the Eighth Circuit that where a scheme of criminal activity far more pervasive and far more complex than that involved here was suspected, it had authority to seize all of the company's business records, regardless of any more particularized probable cause. The Eighth Circuit rejected the argument, in language which conflicts squarely and directly with the approach of the Ninth Circuit here:

> Neither *Andresen* nor any other case supports the basic proposition on which the Government's position depends—that where complex criminal activity is suspected, the scope of a search warrant is not limited by probable cause. As for the Government's argument that the search warrant in the instant case left nothing to the discretion of the officers, this is true only in the most perverse sense. . . . Where the warrant allows a seizure of everything, the items seized necessarily will correspond to the scope of the warrant. The crucial question is whether the warrant authorized too much under the law.

716 F.2d at 499.

If the majority is correct that the warrants here authorized the seizure of all medical records involving the prescription of controlled medication, regardless of the legality of the particular prescriptions or treatment, they are surely wrong that such seizures are authorized by the Fourth Amendment. The warrant in this case, like the warrant in *In re Grand Jury Proceedings*, authorized too much. If such warrants are allowed to stand, then the privacy of millions of businesses, and doctors and their patients, are in clear jeopardy.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that this Court grant certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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(Appendices follows)

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

SEQUOIA PHYSICIANS MEDICAL GROUP, a professional corporation, and JUDE R. HAYES, M.D., Plaintiffs

v.

D.C. NO.: CV F 82-371 EDP

DONALD AYER, as U.S. ATTORNEY for The Eastern District of California, ORVE HENDRIX, as Special Agent in Charge of the Department of Justice Drug Enforcement Administration, Fresno Office, Defendants

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ORDER (Price, J.)
Filed January 17, 1983

I

FACTS

From the verified first amended complaint on file herein the court finds the following facts with reference to this controversy:

Plaintiff Sequoia Physicians Medical Group is a professional corporation engaged in the practice of medicine in the towns of Porterville, Farmersville and Ivanhoe, California, all of which are situate within the Eastern District of California. The plaintiff, Jude R. Hayes, M.D. is a medical doctor duly licensed to practice medicine in the State of California, and is associated with the Sequoia Physicians Medical Group in the practice of medicine. The court has not been able to determine from the evidence adduced at the hearings in this matter how many other physicians are likewise associated with the group.

From the testimony adduced at the evidentiary hearing, the court finds the following facts with reference to the controversy:

A. The Pre-Search Warrant Investigation

On or about the first of 1982, Dr. Hayes became the target of a multi-faceted investi-

gation by the authorities of the State of California. Directly involved in that investigation was the Bureau of Medical Quality Assurance which concerns itself with the licensure of physicians and surgeons, as well as the Bureau of Narcotics Enforcement of the State of California which concerns itself with the illegal dispensing of controlled substances by physicians and surgeons and other persons licensed to prescribe such substances.

Part of the investigation which the State Agents launched consisted of the compilation of prescriptions of Schedule II substances which had been written by Dr. Hayes and filled by various Tulare County pharmacies. The court takes judicial notice that the State of California requires pharmacists to keep such prescriptions on file for a specified period of time and to allow the same to be inspected by appropriate officials of the State of California.

After collecting these prescriptions, the Bureau of Medical Quality Assurance submitted them to physician-experts which they retained for purposes of preparing drug abuse profiles of each person named in the prescriptions. As a result of this operation, a substantial list of suspected drug abusers and persons addicted to habit-forming drugs (particularly Schedule II substances) were identified.

Approximately one week prior to July 29, 1982, Special Agent Craig Winstead of the California Bureau of Narcotics Enforcement contacted certain agents of the Department of Drug Enforcement of the United States government, and requested their help in the investigation.

B. The Search Warrant

On July 28, 1982, Richard E. Combs, United States Magistrate in this District, issued a search warrant authorizing a seizure of certain property, namely:

(1) demerol (mependine), morphine sulfate

and other controlled substances.

(2) all records which document the purchasing, dispensing and prescribing of controlled substances, including but not limited to, records contained in patient charts and all relevant records required to be maintained by Title 21 of the Code of Federal Regulations, Part 1300 to end and Sections 11190 and 11191 of the California Health and Safety Code.

(3) patient logs, appointment books and other records and ledgers reflecting distribution of controlled substances.

(4) correspondence concerning the procuring, transferring, administering, prescribing or dispensing of controlled substances by Dr. Hayes.

Finally, the search warrant concluded with the following conclusionary statement:

"all of which constitute evidence of possible violations of 21 USC 842(a)(1) and 21 USC 843(a)(3)."

The issuing Magistrate, prior to the issuance of the search warrant, received affidavits from Ann Lawson Clark, Compliance Investigator with the Drug Enforcement Administration, presently stationed in Washington, D.C. Her affidavit is a verbatim recital of the language quoted from the search warrant. The affidavit indicates a reliance of Craig C. Winstead, previously identified as the source of her information.

Special Agent Winstead's affidavit indicates the following:

> Your affiant was told by James Pell, Special Agent for the Bureau of Narcotics Enforcement, State of California, that on or about December 3, 1981 he received, from the Bureau of Narcotics Enforcement files in Sacramento, duplicates of prescriptions issued by Dr. Hayes and filled over a period from February 1981 through September 1981. These prescriptions were for Schedule II drugs and pharmacies filling these prescriptions are required by law to file a copy of the prescription with the Bureau of Narcotic Enforcement, State of California.
>
> Based on these duplicate prescriptions, drug profiles were prepared. A drug profile shows the date of the prescription, the drugs that were prescribed, the quantity of drugs prescribed, the number of days which elapsed

between each prescription and the average daily use that would result from this interval as well as the pharmacy at which the prescription was filled.

Between May 3, 1982 and May 5, 1982 your affiant, along with other investigators, removed 5211 prescriptions issued by Dr. Hayes for controlled substances from 15 pharmacies in Tulare County. Seventy-five drug profiles were made from both these prescriptions and the aforementioned profiles made by Agent Pell on December 3, 1981. The seventy-five profiles were sent to H. H. Schwamb, M.D., a licensed physician in the State of California, employed as a medical consultant for the Board of Medical Quality Assurance, Department of Consumer Affairs, State of California, by Investigator Keszler.

After reviewing the drug profiles, Dr. Schwamb sent a declaration back to Investigator Keszler in which he found 58 profiles that caused him to believe that "it is highly probable Dr. Hayes caused, abetted, or prolonged addition [sic] or habituation to controlled substances." (emphasis added)

The affidavits for the search warrant also related a follow-up investigation upon a complaint by one Greg Baker indicated that Baker had become addicted to Percodan as a result of this drug being prescribed for him without prior physical examination or other medical work-up. Baker's complaints were verified by examination of triplicate

prescriptions filed with the Bureau of Narcotics Enforcement pursuant to California law.

The affidavits likewise related that a female deputy sheriff of Tulare County acting in an undercover capacity obtained a prescription for 50 tablets of vicodin without the Doctor performing a physical examination, and without any medical indication therefor. The same undercover agent was able to obtain a prescription for 50 tablets of Percodan from Dr. Hayes on July 27, 1981, October 15, 1981, November 12, 1981, and December 10, 1981. On each occasion, the prescription was for 50 tablets, and each prescription was written without the Doctor performing any physical examination or demonstrating any medical need.

Special Agent Winstead's affidavit related the preparation of the drug profile previously alluded to; of the 75 profiles prepared by the agents, Dr. H. H. Schwamb, medical consultant of the Board of Medical Quality Assurance,

Department of Consumer Affairs of the State of California identified 58 profiles that caused him to believe that "it is highly probable Dr. Hayes caused, abetted or prolonged addition [sic] or habituation to controlled substances."

At some point in time prior to the issuance and service of this search warrant, Agent Winstead, pursuant to California law, searched the federal 222 order forms for Schedule II narcotics at plaintiffs' Porterville clinic, as well as the narcotics log in which Dr. Hayes kept records of demerol and morphine that was administered to patients at the clinic. In that log, Winstead indentified names of patients to whom Hayes was issuing prescriptions for Schedule II drugs.

Agent Winsted's investigation led him to believe that doctors other than Dr. Hayes located at the Sequoia Physicians Medical Group were also issuing prescriptions for

Schedule II drugs to patients identified in the foregoing 58 profiles. However, he stated under oath that his inquiry indicated that such doctors were employed personally by Dr. Hayes.

The foregoing information contained in Agent Winstead's affidavit was not contradicted or disputed at the evidentiary hearing in this matter. The affidavit of Special Agent Winstead, however, contains the following statement:

> Your affiant was told by Donna Hamilton, who was a receptionist employed by Dr. Hayes at his Porterville clinic that one-half of Dr. Hayes patients currently or at one time were heroin addicts and that this information was noted in the patient charts.

This statement was contradicted by testimony under oath given at the evidentiary hearing by Donna Hamilton. She did testify, however, that the patients' charts were color coded in such a manner that patients who had problems with medication, i.e., allergies, potential abuse, etc., could be identified by such codes.

Based upon the foregoing affidavits, the search warrants were issued in the form indicated. This court has previously held, and reaffirms, that there was probable cause for the issuance of a search warrant. The court notes however, that the factual allegations of the affidavits were not incorporated into the search warrants by reference.

C. The Pre-Search Briefing

Prior to the search, all three search parties attended a 45 minute briefing by Complaince Investigator Carter and State BNE Agent Winstead at which they were told the purpose of the search and the history of the prior investigation. All the witnesses agreed that they were told to look at each patient's background, the amount, frequency and type of drugs prescribed. Some of the search party members were given copies of the summons, a list of 75 "drug profile" patient names, and a list of over 100 Schedule II narcotics.

Agent Plavan testified that he was looking

for "excessive" use or prescription of specific controlled substances.

Investigator Connors stated that they were looking for former or current heroin addicts and/or prescriptions of frequent and substantial quantities of Schedule II substances over a period of at least one year.

Agent Horn stated that they were looking for prescriptions only of Schedule II substances, specifically, Dilaudid, Percodan and codeine.

A nurse practitioner at the Ivanhoe office stated that the agents said they were looking for abuse in prescription of Schedule II substances. A medical assistant in Porterville testified that a Tulare County Sheriff's Deputy assisting in the search, whom she had shown where in the chart to look for medication, had said that he didn't know what he was looking for.

Investigator Connors stated that they seized files which "might have been relevant"

for later examination of relevance, and that 50-75% of the files seized were later determined to be relevant. He admitted that four or five files seized from the three offices were later determined to have no indication of prescription of controlled substances at all. The medical assistant in Porterville stated that three of the files returned to Porterville, which was by far the largest office, contained no indication of prescription of controlled substances. She also described several instances in which she corrected the agents who had removed files in which Dilantin for seizure control was prescribed, thinking that Dilaudid had been prescribed.

From the foregoing, it would appear that:

(1) There was no clear direction from those who conducted the briefing as to precisely what the search party was to look for and sieze.

(2) That is such a "clear direction" was

attempted by those briefing the search party, there was a serious breakdown in communication; and

(3) There was no attempt by the officers in charge of the search to instruct the search party to limit the search and seizure to those items described in the affidavit which showed that the officers had probable cause to secure the search warrant.

D. The Search

Search warrants were served simultaneously on the three clinics on July 29, 1982. Compliance investigators such as Ann Carter and Ray Connors, who testified at this hearing, do not have authority to execute search warrants. However, they do, by training, have particular expertise that is helpful in identifying information that would tend to indicate potential violations of federal drug laws by persons licensed to dispense such drugs. Accordingly, the compliance investigators who formed a portion of the search

party, were more or less in charge of the search at the Porterville and Ivanhoe offices.

Porterville

The search party, which consisted of Special Agent Plavan, Fresno office of the DEA, Compliance Investigator Carter, and officers from the Tulare County Sheriff's Office, arrived at Porterville at about 10:30 a.m. on July 29th. They secured the premises and searched each examination room. The search party then began the laborious task of inspecting each of the approximately 6,000 active medical files. According to one witness, one group started "at one end of the files, and another started at the other end of the files," and inspected each of the patient's files, page by page, or sheet by sheet as the case may be. Apparently, by the time that they inspected between 300 and 400 files, it became obvious that the task that they had undertaken was insurmountable. According to the evidence, Compliance

Investigator Connor then conferred by telephone as to how they should overcome the insurmountable obstacle of sheer numbers. Apparently the decision was made, at Porterville at least, to seek out the files of the persons who had been named in the profiles previously mentioned. Some other patient files were identified and seized. Special Agent Plavan testified that 110 files were seized; Donna Hamilton placed the figure at 101.

In addition, the agents seized appointment books, past and future, ledger cards, prescription records, patients' ledger accounts and other documents. Since neither party has seen fit to furnish the court with copies of the inventories, it is not possible to list the items with any more accuracy. In making the search, the officers went through all of the cupboards and drawers in the entire building complex, including the administrative offices of the medical group.

In the course of the sweep through the Porterville building, the briefcase of an Investment Advisor of Dr. Hayes in no way connected with the plaintiff's clinic was searched.

Likewise, the testimony is uncontradicted that Dr. Hayes "legal file" was searched. This was identified as the file which contained all communications from attorneys representing various patients of the medical group. It contained, according to the testimony, letters addressed to the doctors employed in the group, as well as answers thereto. So far as the relevant witnesses could tell, none of the documents from the legal file were seized.

Farmersville

DEA Agent Horn was in charge of the Farmersville search. Employees were enlisted to help and the search party inspected all of the 1200 to 1500 active files at this location. There is a discrepancy in the testimony as to how many files were seized at Farmersville, but the court places the number as somewhere

between 58 and 71. Horn indicated that in determining what files to seize, the search party focused on the drug background of the patient, if any, the frequency with which the patient was receiving Schedule II prescriptions, the amount of Schedule II prescriptions received on each occasion, and the type of drug. Apparently these seizures were without reference to the drug profiles.

Ivanhoe

Compliance Investigator Connors headed the search team at Ivanhoe. At Ivanhoe 55 charts were seized out of the over 1,000 charts inspected. According to Connors, each chart was inspected to see whether or not the chart contained an indication as to whether or not the patient was a confessed heroin addict and whether or not the chart indicated excessive prescriptions of Schedule II substances, both as to time and amount.

E. The Relationship of Files of Persons Identified in the Drug Profiles and Number of Files Seized.

Connors testified that from his subsequent inspection of the charts seized, they obtained the charts of all of those identified in the pre-search profiles, except possibly one or two.

As was noted above, Winstead's affidavit stated that 58 drug profiles were developed by Dr. Schwamb. According to the testimony, somewhere between 236 and 214 files were seized. The government offered no evidence to establish that probable cause existed to seize any files above the 58 belonging to the persons identified in Dr. Schwamb's profiles or the files belonging to the complainant Baker and the undercover Sheriff's Deputy from Tulare County.

F. Use Made of the Seized Documents

To date, the court is not aware of any complaint, information or indictment having been filed against any of the plaintiff Medical Group, Dr. Hayes or any other employee of the group. With few exceptions, copies

have been made of the patients' files and the plaintiff group has received these copies. No complaint was made at the evidentiary hearing that the group was not able to function using these substitutes. There was no listing of the files not copied and returned; nor specific complaint made about their unavailability.

Neither has the court received any request from any patient whose file has been seized, seeking return of the file.

II

LAW

A. Jurisdiction.

The jurisdiction of a United States District Court to entertain a pre-indictment civil action calls into question the propriety of the issuance or execution of a search warrant is founded in Hunsucker v. Phinney, 497 F.2d 29 (5th Cir. 1974). There, the court observed:

> A substantial body of precedent establishes that federal district courts

> have power to order the suppression or return of unlawfully seized property even though no indictment has been returned and thus no criminal prosecution is yet in existence. Though firmly established, this jurisdiction is an exceptional one. Judge Friendly has observed that one may search the jurisdictional statutues, 28 U.S.C. §§ 1331-1358, in vain for a grant of such power in cases where the jurisdictional amount required by § 1331(a) is not satisfied, Grant v. United States, 282 F.2d 165, 168 (CA2, 1960), and Judge Wyzanski has referred to the power as "the anomalous jurisdiction," Lord v. Kelley, 223 F.Fupp. 684 (D.Mass. 1963), appeal dismissed, 334 F.2d 742 (CA 1, 1964), cert. denied, 379 U.S. 961, 85 S.Ct. 650, 13 L.Ed.2d 556 (1965). The theory articulated by most of the cases is that jurisdiction to order suppression or return prior to indictment exists not by virtue of any statute but rather derives from the inherent authority of the court over those who are its officers.

Hunsucker v. Phinney, supra, at 32.

All of the authorities are in agreement that although the jurisdiction exists it should be exercised sparingly. In Richey v. Smith, 515 F.2d 1239 (5th Cir. 1975), the Fifth Circuit collected the considerations that should guide the District Court in determining whether or not to exercise such jurisdiction.

> In Hunsucker we listed some of the considerations that should govern the decision by the district court whether to exercise this "anomalous" jurisdiction. First, and perhaps foremost, is the question whether the motion for return of property accurately alleges that government agents--in this case agents of the IRS--in seizing the property displayed " 'a callous disregard for the constitutional rights of the taxpayer.' " 497 F.2d at 34. Other factors to be considered are: whether the plaintiff has an individual interest in and need for the material whose return he seeks; whether the plaintiff would be irreparably injured by denial of the return of the property; and whether the plaintiff has an adequate remedy at law for the redress of his grievance.

Richey v. Smith, supra, at 1243-44.

Parenthetically, the court notes that the prior cases almost uniformly concerned the use of the search warrant in connection with income tax prosecutions. However, neither counsel has pointed, nor has the court found any logical distinction between a prosecution for income tax violation and a prosecution for other crimes. We analyze the facts of this case in light of the foregoing categories.

B. Does the evidence demonstrate that government agents seizing the property sought

to be returned displayed a callous disregard for the constitutional rights of the taxpayer?

The court has previously held, and reaffirms, that there was probable cause for the issuance of a search warrant. There was, however, no probable cause to issue a search warrant of the all-encompassing breadth and scope of the instant warrant. As the Ninth Circuit has observed under similar circumstances:

> Upon the information available to it, the government knew exactly what it needed and wanted and where the records were located. There was no necessity for a massive reexamination of all records bearing on income and expenses. Were this the law, the Commissioner, upon finding any suspicious deficiency, could order a seizure of every such taxpayer's records upon the mere allegation thast the omission or an inaccurate statement of one item might bespeak inaccuracies as to others which, in his opinion, necessitates a seizure of all records, at office and home. Important as it is to enable the government to obtain information to assure itself of the correct reporting of taxes, it is difficult to believe that the draftsmen of the Fourth Amendment did not insert "unreasonable" to avoid just such an in terrorem state as the Agents created and wreaked here.
>
> Moreover, just as "unreasonable" can be applied to the breadth of the warrant, so much the more can it be applied to the

> manner of execution because it is the "manner" which, as vividly illustrated by the facts of the case, can create and constitute the prohibited invasion. As previously mentioned, the Agents could have sought the allegedly concealed records by other means. If they had desired to question the accuracy of patient payments, they could have made a patient check. All this could have occurred in an orderly way without the sudden assault causing not only damage to the doctor's finances and prestige but undoubtedly inconvenience and possibly pain and suffering to the many patients who could not be treated for weeks due to the disruption.

VonderAhe v. Howland, 508 F.2d 364, at 370.

Even as here, the search exceeded the permissible bounds of the supporting affidavits, it should not signal an automatic application of the court's jurisdiction in granting the petitioner the desired relief. The court must ever bear in mind that the most usual remedy for Fourth Amendment violations is the suppression of the evidence in the criminal proceeding. Here, the litigation has not reached the stage where a criminal violation has been charged.

Had the affidavits been incorporated by reference into the body of the search warrant,

the court might have been able to save the warrants and the fruits of the search by determining, item by item, which were validly seized and which were not legally seized. Cf. In Re Search Warrant Dated July 4, 1977, etc., 572 F.2d 32 (D.C.Cir. 1977). In that case, unlike here, the general descriptions of the search warrant were cross-referenced to the more particular statements contained in the affidavit. Neither has the government offered to return all files except the 60 identified above.[1]

In conclusion, the court is left without tools by which it can segregate out the tainted from the untainted material.

C. Does the plaintiff have an adequate remedy at law?

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[1] The court expresses no opinion as to whether such an offer would cure the deficiencies in the warrant or the search I have previously identified. It does, however, in the court's opinion, impinge upon the bona fides of the government agents in pursuing this investigation.

Since the jurisdiction which the plaintiff seeks the court to exercise is equitable in nature, the adequacy of plaintiff's legal remedies is paramount. See Richey v. Smith, supra. In the instant case, plaintiff has failed to show any irreparable damage that cannot be compensated in money damages. As grievous as their complaint may be, until such a showing is made, this court is reluctant to exercise its equitable jurisdiction in an uncontrolled manner, such as is requested by the plaintiffs.

The court recognizes that the situation here involved is fluid in that circumstances may change. Hence, the order made by the court is without prejudice to the plaintiff to renew its application upon proper showing.

III

ORDER

1. Defendants' motion to dismiss as to the defendant Ayer is granted. Defendants' motion to dismiss as to the remaining defen-

dants is denied.

2. The plaintiffs' motion for return of all seized documents and other tangible things is granted conditionally, as follows:

Unless an indictment is filed against person or persons, the prosecution of which necessitates the use of the seized evidence, all of the evidence seized from plaintiffs' medical offices on July 29, 1982, shall be returned no later than 12:00 Noon, Pacific Standard Time, February 1, 1983.

Plaintiff's requests for suppression, temporary injunctive relief and mandamus are denied save and except as hereinabove ordered.

3. Plaintiffs are granted 30 days in which to amend their complaint to seek monetary damages should they so desire.

4. The granting or denial of all further relief shall await the final orders and determination of the case.

Dated: January 17, 1986

EDWARD DEAN PRICE
United States District Jud

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff

v. NO.: CR-F-83-016 REC

JUDE R. HAYES, Defendant

MEMORANDUM DECISION AND ORDER
(Coyle, J.)
Filed September 28, 1983

Defendant's Motion for Suppression and Return of Evidence came on for hearing before the Honorable Robert E. Coyle on Monday, June 6, 1983. Plaintiff was represented by Brian C. Leighton, Assistant United States Attorney and defendant was represented by Dale Parham.

Following the hearing at which testimony and evidence was presented, the court requested further briefing by defendant on the issue of

defendant's reasonable expectation of privacy, said brief to be filed within ten days of the hearing with plaintiff's reply, if any, within seven days thereafter. Defendant's brief was filed four days late. However, because of the importance of the issue, the court will accept the brief as timely filed.

Upon due consideration of the written and oral arguments of the parties, the court enters its order denying the motion for the reasons set forth herein.

By this motion, defendant seeks the suppression and return of patient medical charts and files, appointment books relating to past and future appointments, ledger cards, prescription records, patients' ledger accounts, documents and all other items and things seized by persons who conducted the search on July 29, 1982 of the offices of defendant and Sequoia Physicians Medical Group, a professional corporation, located at 590 West Putnam, Porterville, California; 684 East

Visalia Road, Farmersville, California; and, 33025 Road 159, Ivanhoe, California. The motion further seeks suppression of the observations of the persons conducting the search and the fruits of the seizures and observations. The motion asserts as grounds justifying granting the motion that (1) the search warrants were unlawful, defective and without probable cause in that: (A) the search warrants were overbroad and constituted general warrants in failing to specify with particularity the items to be seized; (B) no probable cause is stated to believe a federal crime has been committed; (C) no probable cause is stated to seize patients' records; (D) no probable cause is stated to search all three offices of Sequoia Physicians Medical Group; and, (E) the affidavit deliberately conceals and misstates material facts; and (2) the searches and seizures in this case were unlawful and violative of the Fourth Amendment because they were general, exploratory, overbroad, and

unlimited in scope and territorial limits.

The search warrants[1] at issue in this case permitted the search and seizure of:

> (1) demerol (mependine), morphine sulfate and other controlled substance; (2) all records which document the purchasing, dispensing and prescribing of controlled substances, including, but not limited to, records contained in patient charts and all relevant records required to be maintained by Title 21 of the Code of Federal Regulations, part 1300 to end and Sections 11190 and 11191 of the California Health and Safety Code; (3) patient logs, appointment books and other records and ledgers reflecting distribution of controlled substances; (4) correspondence concerning the procuring, transferring, administering, prescribing or dispensing of controlled substances by Dr. Hayes; all of which constitute evidence of possible violations of 21 USC 841(a)(1) and 21 USC 843(a)(3).

---

[1]There is a separate search warrant for each of the three locations of the Sequoia Physicians Medical Group. However, other than the recitation of addresses, the search warrants and accompanying affidavit are identical. Therefore, except as may be specifically required, this memo will refer to the search warrant in the singular.

1. Deliberate Concealment and Misstatement of Material Facts.

In challenging that the affidavit provides probable cause, defendant contends that the affidavit deliberately conceals that Greg Baker was employed as an informant by the Bureau of Narcotics Enforcement, that he was known as an addict with a long history of drug abuse unrelated to any treatment prescribed by defendant, and that his various allegations against defendant were in fact false. Defendant further contends that the following averment in the affidavit that:

> Your affiant was told by Donna Hamilton, who is a receptionist employed by Dr. Hayes at his Porterville clinic that one half of Dr. Hayes' patients currently or at one time were heroin addicts and that this information was noted in the patient charts . . . Miss Hamilton also told your affiant that Dr. Hayes used to run the Methadone Clinic in Tulare County and patients he had at the Methadone Clinic were seeing him as patients as [sic] this time.

completely distorts what Miss Hamilton actually said.

Turning to the contentions concerning

Greg Baker, a failure to disclose personal information about an informant may constitute a false statement within the meaning of Franks v. Delaware, 438 U.S. 154 (1978), United States v. Strini, 658 F.2d 593, 597 (8th Cir. 1981); United States v. Martin, 615 F.2d 318, 329 (5th Cir. 1980); United States v. Marcello, 531 F.Supp. 1113, 1118 (C.D.Cal. 1982). As explained in Franks v. Delaware, supra at 155-156, 171-172:

> [W]here the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable caues was lacking on the face of the affidavit.
>
> . . .
>
> In sum, and to repeat with some embellishment what we stated at the beginning of this

> opinion: There is, of course, a presumption of validity with respect to the affidavit supporting the search warrant. To mandate an evidentiary hearing, the challenger's attack must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernmental informant. Finally, if these requirements are met, and if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required. On the other hand, if the remaining content is insufficient, the defendant is entitled, under the Fourth and Fourteenth Amendments, to his hearing.

The record here does not substantiate that Baker was a paid informant of B.N.E., that either Agents Jones or Winstead knew of his history of drug abuse other than that relayed to Agent Jones by Baker during the March 10, 1980 telephone conversation or that his

allegations against defendant were false. Baker impressed the court as a man with little, if any, regard for the truth. However, the transcript of the recorded telephone conversation between Baker and Agent Jones belies Baker's declaration and his testimony that he did not tell Agent Jones that defendant had prescribed Dilaudid, Percodan or Demoral to him without a prior physical examination or medical work-up or that defendant's prescriptions had caused Baker to become addicted to Percodan or any other medication. The fact that Baker now denies the truth of these allegations does not establish that they were false when made or that Agents Jones or Winstead should have known they were false. In fact, the affidavit establishes that defendant did prescribe for Baker the controlled substances named by Baker in his conversation with Agent Jones. Accordingly, the court does not feel that defendant has made a sufficient showing under Franks v.

Delaware, supra to require the court to disregard the averments in the affidavit concerning Greg Baker.

Defendant also argues that the affidavit's averments concerning Greg Baker are insufficient to establish probable cause because Baker's reliability as an informant is not established by the affidavit. In making this argument, defendant, citing Aguilar v. Texas, 378 U.S. 108 (1964) and Spinelli v. United States, 393 U.S. 410 (1969) contends that a search warrant affidavit relying upon information from an informant must inform the Magistrate of some of the underlying circumstances from which the informant obtained his information and some of the underlying circumstances from which the affiant concluded that the informant was credible or his information reliable.

However, two days after this motion was argued, the United States Supreme Court decided Illinois v. Gates, _____ U.S. _____, 76 L.Ed.2d

527 (1983). Thus, the first question to be answered is whether defendant's challenge should be governed by the two-pronged test of Aguilar/Spinelli or whether it should be governed by the approach set forth in Illinois v. Gates. Because Illinois v. Gates makes no mention whether its decision should be applied to the analysis of search warrant affidavits executed prior to June 8, 1983, the proper analysis to determine retroactive application should be as set forth in Desist v. United States, 394 U.S. 244, 248-248 (1969):

> Ever since Linkletter v. Walker . . . established that 'the Constitution neither prohibits nor requires retrospective effect' for decisions expounding new constitutional rules affecting criminal trials, the Court has viewed the retroactivity of such decisions as a function of three considerations[:]
>
> 'The criteria guiding resolution of the question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards and (c) the effect on the administration of justice of a retroactive application of the new standards.'

The Supreme Court also noted that "[f]oremost among these factors is the purpose to be served by the new constitutional rule and that the factors of reliance and burden on administration become significant ' . . . only when the purpose of the rule in question did not clearly favor either retroactivity of prospectivity.' " Desist v. United States, id. at 249, 251. In addition, the United States Supreme Court recently has addressed the issue of retroactivity in United States v. Johnson, _____ U.S. _____, 73 L.#d.2d 202 (1982). In Johnson, it was held that the rule announced in Payton v. New York (Fourth Amendment prohibits the police from making a warrantless and nonconsensual entry into a suspect's home to make a routine felony arrest) applies to a case which was pending on direct appeal when Payton was decided, Payton not having applied settled precedent to a new set of facts, nor having announced an entirely new or unanticipated principle of law, nor having held either

that the trial court lacked authority to convict the defendant nor that the Fourth Amendment immunized his conduct from punishment. In so holding, the Supreme Court stated at 213-216:

> At the outset, we must first ask whether respondent's case presents a retrospectivity problem clearly controlled by existing precedent. Reexamination of the post-Linkletter decisions convinces us that in three narrow categories of cases, the answer to the retroactivity question has been effectively determined, not by application of the Stovall factors, but rather, through application of a threshold test.
>
> First, when a decision of this Court merely has applied settled precedents to new and different factual situations, no real question has arisen as to whether the later decision should apply retrospectively. In such cases, it has been a foregone conclusion that the rule of the later case applies in earlier cases, because the later decision has not in fact altered that rule in any material way. . . .
>
> Conversely, where the Court has expressly declared a rule of criminal procedure to be 'a clear break with the past,' . . ., it almost invariably has gone on to find such a newly-minted principle nonretroactive. . . . In this second type of case, the traits of the particular constitutional rule have been less critical than the Court's express threshold determination that the ' "new" constitutional interpretatio[n] . . . so change[s] the law that prospectivity is

arguably the proper course,' . . . Once the Court has found that the new rule was unanticipated, the second and third Stovall factors -- reliance by law enforcement authorities on the old standards and effect on the administration of justice of a retroactive application of the new rule -- have virtually compelled a finding of non-retroactivity. . . .

Third, the Court has recognized full retroactivity as a necessary adjunct to a ruling that a trial court lacked authority to convict or punish a criminal defendant in the first place. The Court has invalidated inconsistent prior judgments where its reading of a particular constitutional guarantee immunizesd a defendant's conduct from punishment, . . . or serves 'to prevent [his] trial from taking place at all, rather than to prescribe procedural rules that govern the conduct of [that] trial,' . . . In such cases, the Court has relied less on the technique of retroactive application than on the notion that the prior inconsistent judgments or sentences were void ab initio. . . .

Respondent's case neatly fits none of these three categories. First, Payton v. New York did not simply apply settled precedent to a new set of facts. In Payton, the Court acknowledged that the 'important constitutional question presented' there had been 'expressly left open in a number of our prior opinions.' . . .

By the same token, however, Payton also did not announce an entirely new and unanticipated principle of law. In general, the Court has not subsequently read a decision to work a 'sharp break in the web of the law,' . . . unless that ruling caused 'such an abrupt and fundamental shift

> in doctrine as to constitute an entirely new rule which in effect replaced an older one,' . . . Such a break has been recognized only when a decision explicitly overrules a past precedent of this Court, . . . or disapproves a practice this Court arguably has sanctioned in prior cases, . . . or overturns a longstanding and widespread practice to which this Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved. . . .
>
> Payton did none of these. Payton expressly overruled no clear past precedent of this Court on which litigants may have relied. Nor did Payton disapprove an established practice that the Court had previously sanctioned. To the extent that the Court earlier had spoken to the conduct engaged in by the police officers in Payton, it had deemed it of doubtful constitutionality. The Court's own analysis in Payton makes it clear that its ruling rested on both long-recognized principles of Fourth Amendment law and the weight of historical authority as it had appeared to the Framers of the Fourth Amendment. Finally, Payton overturned no longstanding practice approved by a near-unanimous body of lower court authority. Payton therefore does not fall into that narrow class of decisions whose nonretroactivity is effectively preordained because they unmistakably signal 'a clear break with the past,' . . . .

Professor La Fave comments that prior to Johnson nonretroactivity is the conclusion in applying decisions which expand Fourth Amendment protections. However, in applying

decisions which constitute a narrowing of previously recognized Fourth Amendment rights, he suggests that retroactivity is proper since these decisions do not conflict in any meaningful way with the deterrence objective of the Fourth Amendment exclusionary rule. He states:

> Mose recent decisions have utilized such analysis in applying retroactively Supreme Court decisions which are less beneficial than the cases they overturn. The recent Johnson decision . . . should not be read as disapproving of those cases, for Johnson was concerned with decisions of the Court which broadened Fourth Amendment protections.

La Fave, 3 Search and Seizure, § 11.5(d), pp. 698-699, Supp. 1983, p. 204.

The court's conclusion is that Illinois v. Gates is applicable here if only because the Magistrate's decision that probable cause existed with regard to this search warrant was made with Aguilar/Spinelli in mind, a test more stringent than that set forth in Illinois v. Gates. If the Magistrate's conclusion passes muster under Aguilar/Spinelli, it certainly will pass muster under Illinois v.

Gates. If the Magistrate's conclusion would not pass muster under Aguilar/Spinelli, the criteria used by the Supreme Court would not seem to be offended by the retroactive application of the new test. Illinois v. Gates does not appear to represent a sharp break with the past even though past precedent of the Supreme Court has been overruled, see especially Illinois v. Gates, supra, at 543 n.6. The purpose to be served by the new test clearly is to permit magistrate's and reviewing courts to determine probable cause from the totality of the circumstances and not get enmeshed in the technical niceties inherent in the Aguilar/Spinelli approach. While law enforcement undoubtedly relied upon Aguilar/Spinelli in preparing this affidavit, application of the new test will not result in any prejudice or detriment to their investigations since the new test is less stringent than the old one. And, finally, application of the new test should have no effect on the administra-

tion of justice as would have been the case if the decision adopting the exclusionary rule had been given retroactive effect, See Linkletter v. Walker, 381 U.S. 618 (1965), or if the decision that electronic eavesdropping of private conversations constitutes a search and seizure had been given retroactive effect, Desist v. United States, supra, at least insofar as the court is faced with a motion to suppress pertaining to a search warrant issued prior to June 8, 1983. Thus the court will analyze defendant's objections with Illinois v. Gates in mind.

Turning to Illinois v. Gates, the new test is set forth at 548:

> In its place [the two-pronged test of Auilar/Spinelli] we reaffirm the totality of the circumstances analysis that tradidionally has informed probable cause determinations . . . The task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability the contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to

> ensure that the magistrate had a 'substantial basis for . . . conclud[ing]' that probable cause existed.

As the court interprets the import of this, it means that the court should do its usual analysis of the affidavit to determine if probable cause existed, taking into account the strength or weakness of the information in the affidavit concerning a confidential informant, but not necessarily throwing out the search because that information is not as detailed as may have been necessary under the Aguilar/Spinelli test.

Here, the court is satisfied that the affidavit sets forth sufficient information to satisfy Illinois v. Gates. Baker actually met with defendant and was prescribed controlled substances without a prior physical exam or medical work-up. These prescriptions are stated to be on file with the Bureau of Narcotics Enforcement. The observations and reports of Deputy Jones and the opinion of Dr. Schwamb based on his review of the medical

profiles corroborate the veracity of Baker's information. Accordingly, the search warrant may not be challened on this ground.

Defendant's contention that the averment in the affidavit concerning Miss Hamilton's information is distorted is not supported by the record and has not been shown to be false. Agent Keszler, Special Investigator for the Department of Consumer Affairs, Board of Medical Quality Assurance, Division of Medical Quality Enforcement, testified that he was present during the conversation between Agent Winstead and Donna Hamilton and that Miss Hamilton stated that approximately half of defendant's current patients were addicted patients and she explained the notation system on those files. Miss Hamilton testified that she was referring to approximately twelve patients and that she told Agent Winstead that none of these patients were currently addicted. The court is persuaded that Agent Keszler's recollection is accurate. Accordingly, the

court declines to delete the averments concerning Miss Hamilton's information from the affidavit.

2. Absence of Probable Cause.

In urging that the affidavit does not provide probable cause, defendant raises several other contentions.

Because at this point in the proceedings the court is examining the search warrant facially as opposed to executionally, certain general guidelines should be kept in mind. The court, when reviewing the validity of an affidavit underlying a search warrant, must give great deference to the determination of the Magistrate that probable cause existed and is guided by the principle that an affidavit must be tested in a common sense and realistic fashion, United States v. Johonson, 641 F.2d 652, 568 (9th Cir. 1980). Moreover, if "in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution

of doubtful or marginal cases . . . should be largely determined by the prefernece to be accorded warrants," United States v. Ventresca, 380 U.S 102, 109 (1965); United States v. Mulligan, 488 F.2d 732, 735-736 (9th Cir. 1973), cert. denied 417 U.S. 930 (1974). Probable cause means evidence, though not necessarily admissable, as would persuade a man of reasonable caution to believe that an offense was or is being committed and that evidence of assistance in securing an apprehension or conviction of the perpetrator likely will be found in the place to be searched, United States v. Nilsen, 482 F.Supp. 1335, 1338 D.N.J. 1980). And the Magistrate is entitled to draw reasonable inferences from the facts stated in the affidavit, United States v. Jackstadt, 617 F.2d 12, 14 (2d Cir. 1980), cert. denied 441 U.S. 963 (1980).

Defendant argues that the search warrant is deficient because the affidavit does not establish probable cause to believe a federal

crime has been committed.

Defendant argues that the affidavit contains no facts from which it may be inferred that he was directly dispensing controlled substances to his patients. From this he argues that no probable cause exists that he violated 21 U.S.C. § 843(a)(3) making it unlawful for any person knowingly or intentionally " . . . to acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception or subterfuge." If the dispensing of controlled substances can be a violation of Section 843(a)(3), it appears that defendant's contention is without merit.[2] The affidavit states in pertinent part:

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[2]Initially and sua sponte, the court was concerned whether the dispensing of controlled substances is an element of a violation of Section 843(a)(3). The court's research and that of the parties did not locate a decision or jury instruction which detailed the necessary elements for a violation of this section. However, upon further reflection, the court has decided that its concern is at the least

When your affiant was checking Dr. Hayes' Federal 222 order forms for Schedule II narcotics at his Porterville office, he also saw a narcotic log in which Dr. Hayes kept records of Demerol and morphine that was administered to patients at his clinic. In that log your affiant saw the names of patients that Dr. Hayes was issuing prescriptions to for Schedule II drugs.

. . .

21 CFR 1306.7(b) specifies that 'nothing in this section shall prohibit a physician who is not specifically registered to conduct a narcotic treatment program from administering (but not prescribing) narcotic drugs to a person for the purpose of relieving acute withdrawal symptoms when necessary while arrangements are being made for referral for treatment.' This section further specifies that 'not more than one day's medication may be administered to the person or for the person's use at one time. Such emergency treatment may be carried out for not more than three days and may not be renewed or extended.'

Your affiant has been advised by Drug Enforcement Investigator Ann L. Carter that neither Dr. Hayes nor his employees nor the Sequoia Physicians Medical Group, Inc. is registered with the Drug Enforcement Administration as a narcotic treatment program.

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irrelevant since the affidavit does provide probable cause that 21 U.S.C. § 841(a)(1) has been violated, see infra.

21 U.S.C. § 841(a)(1) provides that it is unlawful for any person knowingly or intentionally " . . . to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense a controlled substance . . . " except as provided by Title 21. As defendant notes, because he is a duly licensed physician, one of the elements which will have to be proved at trial beyond a reasonable doubt is that the prescribing or distributing of controlled substances was not for a legitimate medical purpose in the usual course of his medical practice, see United States v. King, 587 F.2d 956 (9th Cir. 1978); United States v. Black, 512 F.2d 864 (9th Cir. 1975). Defendant contends that there are no facts in the affidavit from which a reasonable suspicion of lack of legitimate medical purpose or lack of usual medical practice may be inferred and further suggests that probable cause cannot be found to exist without an expert medical opinion as to these elements.

However, as plaintiff notes, the court is faced with a question of probable cause, not a question of proof at trial. In fact, even at trial, it is not always necessary that an expert testify to the necessary elements of § 841(a)(1), United States v. Smurthwaite, 590 F.2d 889 (10th Cir. 1979). In this case, the affidavit establishes that controlled substances were prescribed on at least seven separate occasions without a physical examination of the patient by defendant and on at least four occasions without true need on the part of the patient. On at least one occasion, defendant requested that Deputy Jones get X-rays so that defendant could document the medical need for the prescription of Percodan. Although the affidavit does not reveal conduct as extreme as that set forth in United States v. Moore, 423 U.S. 122 (1975) (attached to the search warrant affidavit), one of the omissions in that case was the failure to conduct a physical examination

prior to prescribing controlled substances. Furthermore, the affidavit sets forth the opinion of Dr. Schwamb that in at least 58 cases defendant caused, abetted, or prolonged addiction to controlled substances. While none of this constitutes proof of a violation of § 843(a)(1), it is certainly sufficient to warrant a man of reasonable suspicion that the crime had been committed.

Defendant further argues that there was no probable cause to seize patients' records other than possibly those of Greg Baker, Sandra Jones and the 58 cases referred to by Dr. Schwamb, the names of which are not set forth in the affidavit. He contends that the search warrant purports to authorize the seizure of all patients' records at the medical offices. This latter contention is without merit since the affidavit and the face sheet of the search warrant clearly relate to those patients' records involving the prescription or distribution of controlled

substances. The affidavit establishes probable cause to believe that files other than those set forth in the affidavit would contain evidence of unlawful prescriptions of controlled substances. It would defy common sense to conclude that probable cause was limited solely to the records specifically referred to in the search warrant affidavit because of the inferences which may be drawn that defendant was prescribing controlled substances in violation of law over a period of several months at least and to many people. The patients set forth in the affidavit clearly are not meant to be exclusive but rather reflect the results of the investigation as it had progressed by the time the affidavit was prepared.

Defendant contends that there is no probable cause to search the Farmersville or Ivanhoe offices of the Sequoia Physicians Medical Group because there is no factual basis to assume that the desired records would

be in those offices and the averment that defendant ran those offices is insufficient to provide a nexus between his alleged activities at the Porterville office and the other two offices. The court cannot agree with this position. The affidavit sets forth that defendant ran the three offices and that patient records normally were stored at the office to which the patient went for treatment. As plaintiff argues, a common sense reading of the affidavit leads to the inference that defendant saw patients at all three offices and that allegedly unlawful prescribing of controlled substances would not be confined to just one office of the medical group.

3. Lack of Particularity of Search Warrant.

Defendant challenges each of the categories of items to be seized set forth on the face sheet of the search warrant as lacking the particularity of description of items to be seized required by the Fourth Amendment.

He argues that the search warrant authorized the seizure of virtually all records of all patients of the three clinics, with no limitations as to time, treating physicians, diagnosis or course of treatment, or type of controlled substance being sought.

The Fourth Amendment requires that a search warrant particularly describe the things to be seized. This particularity requirement makes "general searches under [a warrant] impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." Marron v. United States, 275 U.S. 192, 196 (1927).

The search warrant issued by the Magistrate states in pertinent part:

> [There is now being concealed certain property, namely (1) demerol (mependine), morphine sulfate and other controlled substance; (2) all records which document the purchasing, dispensing and prescribing of controlled substances, including, but not limited to, records contained in patient charts and all relevant records required to be maintained

> by Title 21 of the Code of Federal Regulations, part 1300 to end and Sections 11190 and 11191 of the California Health and Safety Code; (3) patient logs, appointments books and other records and ledgers reflecting distribution of controlled substances; (4) correspondence concerning the procuring, transferring, administering, prescribing or dispensing of controlled substances by Dr. Hayes; all of which constitute evidence of possible violations of 21 USC 841(a)(1) and 21 USC 843(a)(3) and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the . . . premises . . . and that grounds for application for issuance of the search warrant exist as stated in the supporting affidavit(s).

The threshold issue in connection with plaintiff's contentions is whether the affidavit may be referred to in resolving whether the warrant satisfies the particularity requirement of the Fourth Amendment.

As a general rule, specificity in an affidavit may not be relied upon to correct undue generality in a warrant unless the affidavit accompanies the warrant and the warrant uses suitable words of reference which incorporate the affidavit, United States v.

Hillyard, 677 F.2d 1336, 1340 (9th Cir. 1982); Matter of Property, Etc., 644 F.2d 1317, 1319 (9th Cir. 1981). The purposes for these requirements are to limit the discretion of the executing officers and to give notice to the person subject to the search what the officers are entitled to seize, Matter of Property, Etc., id.; United States v. Marti, 421 F.2d 1263, 1268 (2d Cir. 1970), cert. denied 404 U.S. 947 (1971). As explained in United States v. Hillyard, id. at 1339:

> Limiting discretion in this sense is the requirement that officers' actions be sufficiently circumscribed so that the Magistrate issuing the warrant is fully apprised of the scope of the search, and can make the determination that the search in all of its dimensions is based upon probable cause and particular descriptions.

Defendant states that the warrants do not incorporate the affidavits and thus cannot be used to refine the scope. The government urges the contrary. The form of warrant used in these cases does not have any language specifically incorporating by reference

an affidavit. The form of warrant does state immediately following the description of the property to be seized " . . . and as I am satisfied that there is probable cause to believe that the property so described and that grounds for application for the issuance of the search warrant exist as stated in the supporting affidavit(s)." Whether this phrase constitutes "suitable words of reference which incorporate the affidavit" is not clear because apparently the Ninth Circuit has not defined this term except by implication. In Matter of Property, Etc., supra, the Ninth Circuit reversed the district court:

> The warrants in this case commanded the executing officers 'to seize only the above specified property as described in the affidavits attached to this search warrant . . .' and 'to seize only those books, magazines, and films which depict the specific sex acts described in the affidavits.'
>
> . . .
>
> . . .
>
> The warrants expressly limited the property subject to seizure to that described in detail in the incorporated affidavits;

> '[a]s to what [was] to be taken, nothing [was] left to the discretion of the officer executing the warrant.' . . . Since the affidavits were physically attached to the warrants, the persons on the premises at the time of the search were provided with notice of which items the officers were authorized to seize.
>
> We conclude that any generality in the warrants was cured by the incorporation and attachment of the affidavits.

While the incorporating language in the warrants at issue here is much weaker than that discussed in Matter of Property, Etc., the affidavits are specifically referred to and, because the Magistrate signed both the search warrants and the affidavits, the Magistrate was aware of the contents of the affidavits when he executed the warrants. It is not too strained a construction that the language in these search warrants satisfies United States v. Hillyard and Matter of Property, Etc., at least absent an indication from the Ninth Circuit that the language approved in Matter of Property, Etc. was intended to be definitive. In addition, the First Circuit has held that a court may consider whether the affidavit

presented to the Magistrate supports the use of a generic description in a warrant, United States v. Cortellesso, 601 F.2d 28, 32 (1st Cir.), cert. denied, 444 U.S. 1072 (1980). Thus, the court concludes that the affidavit may be used to supply any particularity which may be missing from the warrant insofar as defendant is raising this challenge facially. The court considers that the requirement that the affidavit accompany the warrant is more appropriately relevant to defendant's challenge that the searches themselves were overbroad.

The court further is persuaded that a generic description of the records sought by the search warrant is permitted since a more precise description was not possible, United States v. Cortellesso, 601 F.2d 28 (1st Cir.), cert. denied, 444 U.S. 1072 (1980). This position is taken in response to defendant's contention that the search warrant should have authorized the search and seizure of the 58

patient profiles which Dr. Schwamb had found probable that defendant had caused, abetted or prolonged addition or habituation to controlled substances. Plaintiff argues that it would be unreasonable to assume that only these patient files would contain the evidence sought since the initial review of the prescription forms for Schedule II controlled substances by pharmacies lodged with the Bureau of Narcotics Enforcement comprised only a seven month period during 1981 and involved only fifteen pharmacies in Tulare County. Plaintiff also points to the averment in the affidavit:

> While your affiant was checking prescriptions written by Dr. Hayes at various pharmacies in Tulare County, your affiant observed several prescriptions for Schedule II drugs issued by doctors, who work for Dr. Hayes at his offices, to patients who Dr. Schwamb said he felt were addicted to controlled substances. These patients were getting prescriptions primarily from Dr. Hayes but it appeared that these patients would get prescriptions from Dr. Hayes' associates part of the time.

as further indicting that more than the 58 files previously reviewed would contain the

records sought by the warrant. In so arguing plaintiff relies on United States v. Bright, 630 F.2d 804, 811-812 (5th Cir. 1980). In Bright, the Fifth Circuit held:

> Hamilton, of course, does have standing to contest the validity of the search of his house. He argues that inasmuch as the FBI had Jenkins' list of relevant serial numbers, it should have listed those numbers on the warrant and thus been permitted to seize only currency which appeared on that list. Hamilton argues the failure to do so resulted in a search warrant which violated the particularity requirement of the Fourth Amendment.
>
> The Eighth Circuit was faced with similar arguments in United States v. Davis, 542 F.2d 743 (8th Cir.), cert. denied, 429 U.S. 1004, 97 S.Ct. 537, 50 L.Ed.2d 616 (1976), and Hanger v. United States, 398 F.2d 91 (8th Cir. 1968), cert. denied, 393 U.S. 1119, 89 S.Ct. 995, 22 L.Ed.2d 124 (1969). In both cases the court rejected the defendant's argument that the search warrant was insufficiently particular because it did not list the serial numbers it knew were subject to seizure.
>
> The result reached in those cases was correct, but should be limited to cases where listing the serial numbers will not further the interests sought to be protected by the particularity requirement. See Stanford v. Texas, 379 U.S. 476, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965). If the police have only a partial list of relevant serial numbers, listing those numbers in a search warrant as a non-conclusive list of currency subject to seizure gives the party searched no more protection against a

> general serach than is present if the warrant permits simply 'seizure of currency.' If, however, the police have a conclusive list of serial numbers so that other currency is not relevant to their inquirty and not properly subject to seizure, the listinf of those numbers does give the party searched added protection. It is settled law that generic classifications in a warrant are acceptable only when a more precise description is not possible. See James v. United States, 416 F.2d 467, 473 (5th Cir. 1969), cert. denied, 397 U.S. 907, 928, 90 S.Ct. 903, 938, 25 L.Ed.2d 87, 108 (1970). Accordingly, to the extent the police can only legitimately seize currency of known serial numbers, those serial numbers must be listed in the warrant.
>
> The question thus becomes whether it would have been consistent with the purpose of this search to have seized currency other than that which appeared on the Jenkins' list. We find that it would have been. Because the police believed Hamilton was accepting kickbacks from many people besides Fran Jenkins, we cannot say their search for currency should have been limited to that which they knew came from her. Therefore, we hold the search warrant in this case was sufficiently particular to satisfy the Fourth Amendment.

Similarly, in this case it is clear that the list of 58 patient profiles was not intended to be conclusive. At the very least the references in the affidavit to the files of Greg Baker and Sandra Jones establish this inference.

4. Overbreadth of Search.

Assuming that the search warrant is sufficiently particular to satisfy the Fourth Amendment, defendant urges that the searches of the respective offices violated the Fourth Amendment because they were general, exploratory, overbroad, undirected and unlimited in scope and territory.

Even when a search warrant satisfies both the probable cause and particularity requirements of the Fourth Amendment, the search itself must be conducted in a reasonable manner, appropriately limited to the scope and intensity called for by the warrant, Terry v. Ohio, 392 U.S. 1, 17-18 (1968); United State v. Rettig, 589 F.2d 418, 423 (9th Cir. 1978).

It is at this point that the other aspect of the general pre-conditions to the use of an affidavit to supply particularity to a warrant, the affidavit accompanying the warrant, becomes relevant. Ann Carter, a diversion investigator with the Drug

Enforcement Administration who conducted the pre-search briefing, testified that the affidavit was available at the briefing to whomever of the searching officers wanted to read it but that she did not read it out loud during the briefing. There is no testimony that any of the searching officers actually read the affidavit and there is no testimony that the affidavit was taken to the respective search sites. Moreover, Agent Carter, who had read the affidavit, and the affiant, Special Agent Craig C. Winstead of the Drug Enforcement Administration, were members of the teams searching the Porterville and Farmersville offices, respectively. The officers who would be conduocting the searches were divided into three teams, each of which was headed by a Special Agent with the Drug Enforcement Administration. The special agent in charge of each team was given the original and a copy of the search warrant and the location to be searched by that team. During the

briefing, Agent Carter discussed in detail each of the items listed on the search warrant. In conducting the briefing she made reference to a 3-page briefing memorandum, a copy of which was given to each of the persons present. The briefing memorandum states in pertinent part:

> Property authorized to be seized pursuant to federal search warrant:
>
> (1) controlled substances . . .
>
> (2) records, documentation purchasing controlled durgs . . . e.g.,
> - DEA forms 222
> - invoices showing the receipt of any controlled drug
> - narcotic administration logs for Schedule II narcotics (e.g., demerol. morphine)
> - any other logs showing the dispensing of any controlled drug
> - DEA forms 41
> - DEA forms 106
> - patient charts for adult patients who have received (by prescription, administration or direct dispense any Schedule II drug - including, but not limited to:
>
> amphetamine
> codeine
> dexedrine
> dilaudid
> methadone
> morphine
> percobarb
> percodan
> prellidin
> quaalude
> ritalin

> (3) miscellaneous records such as patient logs, appointment books, any records not previously mentioned showing the distribution of controlled drugs
>
> (4) any correspondence concerning the procuring, transferring, administering, prescribing or dispensing of controlled drugs.

In addition, the special agent in charge of each team was given a copy of the list of 75 patient names which Dr. Schwamb had reviewed in connection with the investigation. The court feels that these circumstances are sufficient to satisfy the purpose for the requirement that the affidavit accompany the warrant, see United States v. Waugneux, 683 F.2d 1343, 1351 n.6 (11th Cir. 1982).

Defendant, citing United States v. Heldt, 668 F.2d 1238, 1261, 1261 n.37 (D.C. Cir 1981), cert. denied, 102 S.Ct. 1971 (1982), also argues that the record shows a complete lack of adequate preparation on the part of the searching agents thereby invalidating the searches. In addition to the facts just alluded to supra, at the briefing, Agent

Carter explained that the agents were to search primarily for documents listed on the search warrant or the briefing memorandum pertaining to the prescribing or dispensing of Schedule II controlled substances even though the search warrant authorized the seizure of items pertaining to Schedules I-IV controlled substances. Although no specific guidelines were set forth at the briefing, the agents were told to concentrate on patient files indicating possible excessive prescriptions of Schedule II controlled substances by looking to the frequency of the prescription and its amount. It also was brought out at the briefing that those patient files tagged with a yellow or orange sticker or marked on the left hand side as a drug abuser were narcotics addicts. Howver, the agents were not told to seize these files irrespective of the controlled substance prescribed. In addition, the special agent in charge of each team was

given a copy of the list of 75 patient names which Dr. Schwamb had reviewed in connection with the investigation. In United States v. Heldt, id, the search and seizure operation at issue on appeal involved over 200 F.B.I. agents and government personnel who spent over 20 hours examining the files and papers maintained in two California offices of Scientology pursuant to a search warrant which specified 162 separate descriptions of seizable documents relating to several offenses. The majority of the agents spent the day before the search being thoroughly briefed on the operation. They were provided with copies of the affidavit and the search warrant, and questions regarding the warrant and the law of search and seizure were answered by their team leaders and by Assistant United States Attorneys. The court stated in pertinent part:

> Warrants are not self-executing; they require agents to carry them out. In order for a warrant's limitations to be effective, those conducting the search

> must have read or been adequately apprised of its terms. Where, as here, the terms are numerous, complex, and potentially overbroad unless limited by the specifications of an extensive affidavit, the need for careful preparation on the part of those searching is essential. In this case we are convinced that most of the agents conducting the search were provided with as much preparation as was reasonable under the circumstances to enable them to carry out the warrant's complicated terms.

In this case, the court believes the record reveals adequate preparation of the searching officers. Heldt cannot be read as stating a minimum standard for the degree of agent preparation required to validly execute a search warrant. The sheer magnitude in terms of numbers of officers and seizable items undoubtedly required the type of briefing conducted in Heldt. The case before the court is not comparable.

Defendant further argues that the searches were overbroad in operation because the searching officers understood they were to use their discretion in determining which patient files to seize because of possible

excessive prescribing and because certain files were seized in order that they be examined subsequent to the searches. In response to the first point, the testimony establishes that the purpose for focusing on patient files indicative of excessive prescribing was an attempt to limit the number of files seized but that the searching officers were authorized to seize any files of patients to whom Schedule II controlled substances had been prescribed. Thus, if the seizure of patient files containing documentation of prescriptions or dispensations of Schedule II controlled substances is valid, the court has difficulty in finding a Fourth Amendment violation because the definition of excessive prescribing of Schedule II controlled substances was not specifically set forth at the briefing. Plaintiff does not respond to this particular argument and defendant cites no authority that an otherwise valid description of items to be seized can be invalidated

merely because the searching agents attempt to circumscribe the number of those items to be seized. While it would have been better practice to set forth at the briefing the specific parameters of excessive prescribing, the court cannot see that the failure to do so is sufficient to invalidate the searches.

Turning to the defendant's second point, that the agents seized patient files in order to examine them subseuqent to the searches, the record indicates that the primary criterion for the seizure of patient files used by the agents searching at the respective offices were the prescription or dispensation of Schedule II controlled substances, the list of 75 patient names and the triplicate prescription forms. There is no testimony that the agents deliberately were seizing patient files not encompassed by these criterion. The only testimony that files were seized which the agent felt would merit further review was that of Special Agent Raymond Conner who

assisted in the search of the Ivanhoe office. However, the context of that testimony is that such files were seized in accordance with the primary criterion set forth above. Defendant's citation to United States v. Heldt, supra at 1267 is not controlling. At that portion of the opinion, the Court of Appeal was concerned with the application of the plain view exception to the requirement of a search warrant. Here, it appears that the seizures were attempted to be made in accordance with the search warrant.

Finally, defendant, citing VonderAhe v. Howland, 508 F.2d 364 (9th Cir. 1974), argues that the manner in which the searches were conducted violated the Fourth Amendment. In VonderAhe, Treasury Agents acting pursuant to a search warrant, entered Dr. VonderAhe's office at 8:15 a.m. They took over the premises and continued their search until 1:15 p.m. The search necessitated cancellations of patient appointments because patient cards and

records were seized. In addition, Dr. VonderAhe was unable to resume his practice for approximately two weeks when most of the original records were returned. The Ninth Circuit held at 370:

> Moreover, just as 'unreasonable' can be applied to the breadth of the warrant, so much the more can it be applied to the manner of execution because it is the 'manner' which, as vividly illustrated by the facts of this case, can create and constitute the prohibited intrusion. As previously mentioned, the Agents could have sought the allegedly concealed records by other means. If they had desired to question the accuracy of patient payments, they could have made a patient check. All this could have occurred in an orderly way without the sudden assault causing not only damage to the doctor's finances and prestige but undoubtedly inconvenience and possibly pain and suffering to the many patients who could not be treated for weeks due to the disruption.

The searches of the respective offices were not disruptive in the sense condemned in VonderAhe. Obviously, any search for records in a medical office is going to cause some disruption of normal routine. However, the testimony in this case reveals that patients were allowed to keep their appointments if

they so desired with a slight delay as examining rooms were searched or staff were interviewed. The staff at the offices were allowed to photocopy any portion of the files or records being seized which the staff deemed necessary to the operation of the offices and the medical practice. Except for the first half-hour of the search of the Ivanhoe office, the staff were permitted to use the telephone for outgoing calls and there was no restriction placed on incoming calls. The half-hour restriction on outgoing calls from Ivanhoe office was imposed so that the other two offices could not be alerted to the search before the agents arrived. While the agents were at the respective offices from approximately 10:30 a.m. to approximately 5:00 p.m., this lengthy stay was necessitated by the volume of files at the offices and the photocopying. There were approximately 6,000 to 8,000 patient files at the Porterville office, approximately 1,200 to 1,500 patient files at the Farmersville

office and approximately 1,000 files at the Ivanhoe office. At approximately 12:30 p.m., Agent Carter, who was directing the search of the Porterville office, realized that the search of all the patient files could not be completed in one day. She therefore decided to limit the search to those files of patients whose names were on the list of 75 previously submitted to Dr. Schwamb and those files for which there were triplicate prescription forms. This decision was communicated to the other teams and at approximately 2:30 p.m. the searchers so limited the search. Only a total of 217 patient files were seized from the three offices. Some of the files seized were multiple files for a single patient. Of these files, eighteen did not involve any prescribing or dispensing of controlled substances. Of the remaining 199 patients' files, approximately 50 did not involve the prescription or dispensation of Schedule II controlled substances. Of the files seized, all but 42

have been returned as have the patient logs and appointment books. Given these facts, it is difficult to equate these searches to the type of search disapproved in VonderAhe and the court declines to do so.

Accordingly, defendant's motion is denied.[3]

DATED: September 28, 1983.

ROBERT E. COYLE
United States District Judge

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[3]Because of the court's conclusions in this case, it is unnecesesary to reach the issues presented by plaintiff's assertion that defendant lacked a reasonable expectation of privacy in the reocrds the subject of the searches.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee

v.

No.: 84-1276
D.C. No.:
Cr83-016 MDC

JUDE R. HAYES, Defendant-Appellant

OPINION
Filed May 9, 1986

Appeal from the United States District Court
for the Eastern District of California
M.D. Crocker, District Judge, Presiding
Argued and Submitted November 12, 1985
San Francisco, California

Before: WALLACE, ANDERSON, and PREGERSON
Circuit Judges

WALLACE, Circuit Judge:

Hayes appeals from his conviction for prescribing Schedule II drugs to patients in violation of the Controlled Substances Act,

21 U.S.C. § 841(a)(1) (the Act). He contends that the jury was improperly instructed and that the government should not have been allowed to introduce in evidence his office records secured pursuant to search warrants. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

I

Hayes is a physician and treats patients at his offices in Porterville, Farmersville, and Ivanhoe, California. After receiving information that Hayes was prescribing medication in violation of the Act, agents of the United States Drug Enforcement Administration obtained warrants from a federal magistrate to search Hayes's three offices. The agents executed the search warrants and seized over 200 medical files.

Hayes then instituted a civil action for the return of the records, alleging that the issued warrants were unconstitutionally overbroad. The district court in the civil action

concluded that the warrants were overbroad and ordered all of the seized records and documents to be returned unless Hayes was indicted by February 1, 1983. On January 28, 1983, a federal grand jury indicted Hayes on 640 counts of prescribing Schedule II drugs to his patients in violation of the Act. The indictment focused on Hayes's treatment of 20 patients over a three-year period; each prescription of a Schedule II drug constituted a separate count.

Prior to trial, Hayes moved to suppress the evidence seized from his offices on the basis that there was no probable cause to issue the search warrants and that the warrants were general, overbroad, and violated the fourth amendment. A different district judge denied his motion and held, contrary to the decision by the judge in the civil action, that the warrants were not overbroad. Hayes never argued that the decision by the court in the civil action collaterally estopped the court

in the criminal action from considering the validity of the warrant. Therefore, we will not consider that issue on appeal. See United States v. Lasky, 600 F.2d 765, 769 (9th Cir.), cert. denied, 444 U.S. 979 (1979); Mahoney v. United States, 420 F.2d 253, 255 (D.C. Cir. 1969).

After an eight-week trial, the jury returned convictions on 281 counts. Hayes was sentenced to three years in prison with a consecutive three-year term of probation and was fined $100,000.

II

Hayes contends that the district court's initial and supplemental jury instructions were erroneous. A defendant is entitled to a jury instruction on a defense theory if the theory has a basis in law and in the record. See United States v. Coin, 753 F.2d 1510, 1511 (9th Cir. 1985) (per curiam). The adequacy of the jury instructions, however, is determined by examining the instructions as a whole.

See United States v. Wellington, 754 F.2d 1457, 1463 (9th Cir.) (Wellington), cert. denied, 106 S. Ct. 592 (1985). "[I]t is not error to refuse a proposed instruction so long as the other instructions in their entirety cover that theory." United States v. Kenny, 645 F.2d 1323, 1337 (9th Cir.), cert. denied, 452 U.S. 920 (1981).

The district court has broad discretion in formulating the instructions and need not give an instruction in the precise language proposed by the defendant. See United States v. Echeverry, 759 F.2d 1451, 1455 (9th Cir. 1985). "Imperfectly formulated jury instructions will serve as a basis for overturning a conviction only upon a showing of abuse of discretion." Wellington, 754 F.2d at 1463.

Hayes contends that the initial jury instructions concerning the elements of the offense with which he was charged were misleading. The court instructed the jury that the government must prove that Hayes "knowing-

ly did an act which the law forbids, purposefully intending to violate the law." The court read to the jury the relevant part of 21 U.S.C. § 841(a)(1) and then instructed them that in order to convict Hayes they

> must find as to each of those counts that the Government has proven beyond a reasonable doubt each of the elements necessary to establish the offense: 1) That Dr. Jude R. Hayes, defendant, was a registrant authorized to dispense controlled substances for legitimate medical purposes; 2) That the defendant knowingly and intentionally issued a prescription; 3) That the prescription was for a Schedule II narcotic controlled substance as alleged; and 4) That the prescription was issued by him other than in good faith, for a legitimate medical purpose, in the usual course of his professional practice.

The questions raised before us pertain to the fourth element. The court instructed the jury about the meaning of good faith:

> [G]ood faith means an honest effort to prescribe for a patient's condition in accordance with the standard of medical practice generally recognized and accepted in the country. Mistakes, of course, are not a breach of good faith. . . .
>
> You need not agree with or believe in a standard practice of the profession, but must only be concerned with a good faith attempt to act according to them. Good faith is not merely a doctor's sincere intention towards the people who come to see him, but, rather, it involves

> his sincerity in attempting to conduct himself in accordance with a standard of medical practice generally recognized and accepted in the country.

Hayes contends that these instructions are misleading and contrary to our holding in United States v. Boettjer, 569 F.2d 1078 (9th Cir.) (Boettjer), cert. denied, 435 U.S. 976 (1978). In Boettjer, we reviewed a jury instruction which stated that to convict a physician of distributing Schedule II drugs in violation of the Act, the jury had to find beyond a reasonable doubt that the prescription was issued "other than in good faith for a legitimate medical purpose and in accordance with the medical standards generally recognized and accepted in the medical profession." Id. at 1081 (emphasis in original). We expressed concern in Boettjer that the jury could have interpreted this instruction in three conflicting ways, but concluded that there was no persuasive showing of actual prejudice and that a more precise instruction would not

have altered the jury's deliberations. Id. at 1081-83.

Hayes raises a similar argument here. He contends that the instructions given permitted the jury to convict him if he acted in good faith but failed to conform to standard medical practices -- that is, a conviction based on negligence. Hayes's argument is weighty only if we read in isolation the instruction which states that a prescription must have been issued "other than in good faith, for a legitimate medical purpose, in the usual course of his professional practice." Jury instructions, however, must be viewed as a whole in the context of the entire trial. See Wellington, 754 F.2d at 1463. In light of the district court's jury instructions on specific intent and good faith, we fail to see how the jury could interpret the instructions as permitting a finding of guilt based on mere negligence. Indeed, we rejected this very argument in Boettjer after concluding that

"[i]t strains belief to imagine that the jury could have been misled into finding the defendant guilty if his actions were in accordance with medical standards." Boettjer, 569 F.2d at 1082 (emphasis in original). We emphasized that any possible confusion was eliminated by later instructions dealing with good faith and its relationship to standards of medical practice. Id. at 1082. Although more precise language could have been used, we reach the same conclusion in this case.

The court also instructed the jury about the Act's prohibition against prescribing Schedule II drugs for detoxification and maintenance of addiction:

> Narcotic withdrawal or addiction is not a sufficient medical condition justifying the prescribing or administering of a narcotic controlled substance. Therefore, if you find that the defendant . . . wrote a prescription for a narcotic control [led] substance on a narcotic addict who did not have a medical complaint other than addiction or withdrawal requiring the type of narcotic controlled substances prescribed, then the issuance of said prescription would not be in good faith in the usual course of professional practice for a legitimate medical purpose.

Hayes argues that this is improper "because it imposes an objective test as to both the existence of a medical complaint and the appropriateness of treatment." The instruction, however, properly states the law. See 21 C.F.R. § 1306.07(c) (1985). If a patient were a narcotic addict and the only medical complaint was addiction or withdrawal, Hayes could not have issued the drugs in good faith. The instruction refers only to "a medical complaint other than addiction or withdrawal" as a proper basis for prescribing a Schedule II drug to a drug addict. Any vagueness in the instruction favored Hayes since section 1306.07(c) permits prescribing narcotic drugs to narcotic addicts only for "intractable pain in which no relief or cure is possible or none has been found after reasonable efforts." Id.

Without doubt, the instructions could have been improved. When viewed as a whole, however, the initial jury instructions given by the district court relating to both the

elements of a section 841(a)(1) violation and the Act's medical exception were sufficient. But Hayes further contends that even if the initial instructions correctly stated the law, they were confusing, and that the district court compounded the confusion in its supplemental instructions to the jury.

B.

While deliberating, the jury submitted four substantive questions to the district court. Hayes contends that the court's responses misstated the medical exception and thus created additional confusion concerning the necessary elements for a conviction under section 841(a). We have stated that " '[t]he necessity, extent and character of additional instructions are matters within the sound discretion of the trial court.' " United States v. Collom, 614 F.2d 624, 631 (9th Cir. 1979) (Collom), cert. denied, 446 U.S. 923 (1980), quoting Wilson v. United States, 422 F.2d 1303, 1304 (9th Cir. 1970). At the same

time, the district court has the responsibility to eliminate confusion when a jury asks for clarification of a particular issue. See United States v. McCall, 592 F.2d 1066, 1068 (9th Cir.) (per curiam), cert. denied, 441 U.S. 936 (1979).

The jury first asked:

> [Assuming Hayes is an expert on drug dependence and understands the consequences of Schedule II medication,] would Dr. Hayes be guilty of prescribing the med's charged in this case if after considering the above noted assumptions we felt that Dr. Hayes didn't prescribe them for drug maintenance or addiction and he prescribed the med's for other legitimate reasons such as moderate to severe pain that he sincerely felt existed in any individual patient [?] Would any [doctor] be guilty of the crimes charged under these circumstances[?]

The district court answered the jury: "If Dr. Hayes prescribed the drugs in good faith for legitimate medical purpose in the usual course of professional practice and did not prescribe them for drug maintenance or addiction he is not guilty." Hayes agreed to the court's supplemental instruction, except that he felt the "did not prescribe them for drug mainte-

nance or addiction" language was confusing since the jury's question assumed that he did not do so. This contention is meritless, for the court's answer plainly incorporates the question's assumption.

The jury next asked: "If we find a patient was an addict and the doctor treated his addiction with Sched[ule] II drugs, and the patient experienced chronic pain, and the doctor treated the chronic pain in a good faith effort, how would we find -- guilty or not guilty?" The court answered:

> I can not answer this question directly. In the case of the treatment of a patient who is an addict, all of the factors you have mentioned must be considered in order to determine whether or not the Schedule II drugs were prescribed in good faith, for legitimate medical purpose in the usual course of professional practice.

Hayes objected on the ground that under Boettjer the answer should have been "not guilty." We disagree. An answer of "not guilty" might have misled the jury into believing that Hayes could treat addiction with Schedule II drugs,

which he could not do. Consequently, the district judge did not abuse his discretion in not answering the jury's question directly. The court's restatement of the initial instruction was adequate. See Collom, 614 F.2d at 631.

The jury then asked: "Is it legal for any physician to prescribe Schedule II drugs to relieve pain for as long a time as the physician believes the pain to be present?" The judge answered: "Not always. The physician must weigh the risk of addiction against the benefits (and see the answer to other questions)." Hayes's counsel acknowledged that the weighing of the risk of addiction versus the benefits of a Schedule II drug was relevant. He argued, however, that the jury should also be specifically instructed that the duration of a prescription alone does not make the prescription illegal. We see no error in the court's refusal to give this additional instruction since the court's

response to the jury's inquiry adequately referred the jury to the relevant considerations.

Lastly, the jury asked:

> The opinion has been expressed that our decision hinges on whether we can determine, beyond reasonable doubt, whether in fact pain existed. The conclusion based on this opinion is that since no human can determine the degree of another person's pain, we cannot rule on the exist[e]nce or nonexist[e]nce of pain.

The court answered: "The existence of pain is not the only question involved. The jury must determine whether or not the Doctor in good faith believed that a painful condition existed that warranted the prescription of Schedule II drugs for the period of time and dosages involved." Hayes argues that this obscures the subjective element of Hayes's good faith by suggesting that pain must exist. The court's answer, however, clearly stated that pain is not the only consideration and that the jury must determine if the physician in good faith believed that pain existed. Hayes also argues that use of the term

"warranted the prescription" suggested to the jury that an objective test should be applied. When read in context that term refers only to the doctor's subjective good faith. There was no error.

C.

Hayes raises two other arguments related to the jury instructions. He contends that the instructions impermissibly shifted the burden of proof to him. We disagree. The jury instructions clearly stated that "the Government has the burden of proving every element of the charges beyond a reasonable doubt" and that the "burden never shifts to the defendant."

Hayes also contends that section 841(a)(1) is unconstitutionally vague as applied. Hayes admits that the facial validity of section 841(a)(1) has been upheld against attacks for vagueness. See United States v. Moore, 423 U.S. 122, 145 (1975); United States v. Rosenberg, 515 F.2d 190,

197-98 (9th Cir.), cert. denied, 423 U.S. 1031 (1975). He contends, however, that the statute is vague as applied in this case because of erroneous jury instructions that "exacerbated" potentially ambiguous language in the statute. We have concluded that the initial and supplemental instructions were not erroeous. Thus, we reject Hayes's argument that the circumstances of this case caused section 841(a)(1) to be unconstitutionally vague as applied.

III

Hayes contends that the warrants for the search of his three offices were facially overbroad and authorized a general search and seizure in violation of the fourth and fourteenth amendments. The district court concluded that any lack of particularity in the warrants was eliminated by the affidavits submitted in support of the warrants and, alternatively, that the general description in the warrants was permissible because a

more precise description was not possible. We review de novo the district court's conclusion that the warrants were not facially overbroad. See United States v. McClintock, 748 F.2d 1278, 1282 (9th Cir. 1984) (McClintock), cert. denied, 106 S. Ct. 75 (1985).

The fourth amendment requires that "warrants shall particularly describe the things to be seized [and] makes general searches under them impossible." Marron v. United States, 275 U.S. 192, 196 (1927). The particularity requirement ensures that "nothing is left to the discretion of the officer executing the warrant." Id.; see United States v. Hillyard, 677 F.2d 1336, 1339 (9th Cir. 1982) (Hillyard). A warrant need only be reasonably specific in its description of the objects of the search and need not be elaborately detailed. See United States v. Brock, 667 F.2d 1311, 1322 (9th Cir. 1982), cert. denied, 460 U.S. 1022 (1983). Thus, when probable cause exists, "all items

in a set of files may be inspected during a search, provided that sufficiently specific guidelines for identifying the documents sought are provided in the search warrant and are followed by the officers conducting the search." United States v. Tamura, 694 F.2d 591, 595 (9th Cir. 1982) (Tamura).

A.

We first examine whether the government's affidavits can be considered in determining if the warrant lacked particularity. An affidavit may be relied on to provide the requisite particularity in an otherwise overbroad warrant only "if (1) the affidavit accompanies the warrant, and (2) the warrant uses suitable words of reference which incorporate the affidavit therein." Hillyard, 677 F.2d at 1340; see United States v. Property Belonging to Talk of the Town Bookstore, Inc., 644 F.2d 1317, 1319 (9th Cir. 1981) (Talk of the Town Bookstore).

Here, it is disputed whether the warrants

adequately incorporated the affidavits by reference, but it is clear that the affidavits did not accompany the warrants. The district court concluded that the government's affidavits could "be used to supply any particularity which may be missing from the warrant," and that the requirement that an affidavit accompany the warrant is relevant only to a challenge that a search is overbroad. We disagree. The purpose of the accompanying affidavit clarifying a warrant is both to limit the officer's discretion and to inform the person subject to the search what items the officers executing the warrant can seize. Talk of the Town Bookstore, 644 F.2d at 1319. If the needed affidavits are not attached to the warrant, then neither purpose is served. Consequently, in this case the affidavits may not be considered in determining whether the warrant is facially overbroad.

B.

We now examine whether the warrant on

its face is overbroad and in violation of the fourth amendment. The magistrate issued three warrants, one for each of Hayes's offices, that authorized the officers to seize

> (1) demerol (mependine), morphine sulfate and other controlled substance; (2) all records which document the purchasing, dispensing and prescribing of controlled substances, including, but not limited to, records contained in patient charts and all relevant records required to be maintained by Title 21 of the Code of Federal Regulations, Part 1300 to end and Sections 11190 and 11191 of the California Health and Safety Code; (3) patient logs, appointment books and other records and ledgers reflecting distribution of controlled substances[1/]; (4) correspondence concerning the procuring, transferring, administering, prescribing or dispensing of controlled substances by Dr. Hayes; all of which constitute evidence of possible violations of 21 USC 841(a)(1) and 21 USC 843(a)(3).[2/]

Hayes contends that the warrants are overbroad on their face because they permitted the officers to examine thousands of patient files. The number of files that could be scrutinized, however, is not determinative. The search and seizure of large quantities of material is justified if the material is within the scope of the probable cause underlying the warrant. McClintock, 748 F.2d at

1283; United States v. Gomez-Soto, 723 F.2d 649, 653 (9th Cir.), cert. denied, 104 S. Ct. 2360 (1984); United States v. Offices Known As 50 State Distributing Co., 708 F.2d 1371, 1375 (9th Cir. 1983) (50 State), cert. denied, 465 U.S. 1021 (1984).

The magistrate found probable cause to issue the warrants based on an affidavit that described a complaint by one patient, statements by an undercover officer, testimony by one of Hayes's receptionists, and testimony of a medical consultant who reviewed Hayes's prescription records for Schedule II drugs at 15 pharmacies in Tulare County, California, and concluded that there was a high probability that Hayes "caused, abetted, or prolonged addi[c]tion or habituation to controlled substances." The magistrate found probable cause to seize all controlled substances and all records that related to the procuring, transferring, administering, prescribing, or dispensing of controlled substances. On

appeal, Hayes does not challenge this determination of probable cause. The fact that the officers discovered, upon arrival at the three offices, that there were over 10,000 patient files does not detract from the magistrate's initial finding of probable cause.

Hayes also contends that the warrant failed to provide standards for the officers to distinguish between those files the officers could seize and those they could not and that the warrants should have been more narrowly drawn. We disagree. In searches of this nature "some innocuous documents will be examined, at least cursorily, in order to determine whether they are, in fact, among those papers authorized to be seized." Andresen v. Maryland, 427 U.S. 463, 482 n.11 (1976) (Andresen). Here, the officers were limited in their seizure to documents dealing with the distribution of controlled substances.[3/] The warrants did not permit them to

seize any documents unrelated to controlled substances. See United States v. Whitten, 706 F.2d 1000, 1009 (9th Cir. 1983), cert. denied, 465 U.S. 1100 (1984). Where, as here, there are articulated standards that "reasonably guide the officers in avoiding the seizure of protected property, a search warrant authorizing such seizure is not a general warrant." United States v. Pollock, 726 F.2d 1456, 1466 (9th Cir. 1984); see Andresen, 427 U.S. at 482 n.11; Tamura, 694 F.2d at 595; United States v. Federbush, 625 F.2d 246, 251 (9th Cir. 1980); United States v. Louderman, 576 F.2d 1383, 1389 (9th Cir.), cert. denied, 439 U.S. 896 (1978). The fact that the officers did not seize all of the materials permitted by the warrant does not mean that they possessed the type of unfettered discretion that violates the fourth amendment.

We also conclude that the warrants need not have been more narrowly drawn. Hayes contends that the officers possessed information

concerning 58 cases of potential violations involving Schedule II drugs and that the warrants should have been limited to those 58 patient files. Such a conclusion, however, ignores the magistrate's finding, unchallenged on appeal, of probable cause to seize all documents concerning controlled substances.[4/] The 58 known cases could fairly be considered as representative of more pervasive violations of the Act. See 50 State, 708 F.2d at 1374-75.

AFFIRMED.

FOOTNOTES

1. In two of the warrants, this provision read: "patient logs, appointment books and other records and ledgers reflecting patient visits to Dr. Hayes or his employees, constituting evidence of illegal distribution of controlled substances."

2. The dissent states that the United States attorney admitted at oral argument that he did not draft or review the warrants or affidavits and that such a failure was a departure from normal office procedures. Dissent, p. 1, n.1. The United States attorney, however, also stated that he assisted in drafting the warrants and affidavits. The only departure from normal office procedures was his failure to review the final drafts of the affidavits and warrants before they were submitted to the magistrate.

3. The dissent contends that we have failed to consider language in two of the warrants in determining if the warrants violated the particularity requirement of the fourth amendment. Dissent, p. 2. The Farmersville and Porterville warrants contain language that the dissent interprets as limiting the seizure of certain records to those that constitute "evidence of illegal distribution of controlled substances." The Ivanhoe warrant contains no such limiting language. All three warrants, however, contain additional language that authorized the seizure of all records that "document the purchasing, dispensing, and prescribing [of] controlled substances." Hayes contends, and the government concedes, that the warrants authorized the seizure of all records and documents that related to transferring, procuring, administering, prescribing, or dispensing of controlled substances. Therefore, the warrants did not require the officers to determine whether a particular item constituted "evidence of illegal distribution of controlled substances."

4. The dissent states that the United States attorney admitted during oral argument that the failure to limit the warrants to records involving Schedule II drugs was a "mistake." Dissent, p. 1, n. 1. However, the United States attorney later argued that the warrants properly were not limited to Schedule II drugs because there was probable cause to conclude that Hayes was dispensing controlled substances in violation of the law. In any event, the United States attorney's admission of a "mistake" in response to questioning by the court is irrelevant because the magistrate found that there was probable cause to issue the warrant with reference to controlled substances generally and not as to Schedule II drugs only.

PREGERSON, Circuit Judge, dissenting.

Based on information lawfully received from various pharmacies, federal agents determined that Dr. Hayes illegally prescribed Schedule II drugs to 58 patients. Instead of limiting the search to these suspected patients and substances, the three search warrants issued in this case broadly authorized the agents to search each of over 10,000 patient files, located in three medical offices, for information relating to any controlled substance. Because the actions of the federal authorities in this case demonstrate a cavalier disregard for the Fourth Amendment's particularity requirement,[1]

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[1] At oral argument, the United States attorney assigned to this case repeatedly acknowledged that the failure to limit the search warrants to records involving Schedule II drugs or specific patients was a "mistake" on the part of the agents who drafted the warrants. Government counsel conceded that "in hindsight" the warrants should have been limited to the suspect patient files referred to in the affidavits.

This error was apparently due to counsel's failure adequately to assist the agents in drafting the warrants. Counsel noted that the agents typed up the

I am unable to countenance the majority opinion's approval of the search in this case.[2]

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warrants and affidavits and that he failed to review them before they were presented to the magistrate because "for some reason I was not available." He further acknowledged that his failure to review the warrants was a departure from "customary practice."

Thus, although the attorney asserted that he assisted in preparing the affidavits and warrants, it appears that he did not give the agents meaningful guidance on how the documents should be worded. In fact, counsel candidly admitted that, "I was quite suprised that [the warrant] ended up reading the way it did."

[2] I agree with the majority opinion that the affidavits, which were neither served with nor attached to the search warrants, may not be relied upon to provide the requisite specificity. It is noteworthy that the district court believed that the affidavits were essential to its decision to uphold the warrants while the majority finds that the warrants are sufficiently particular even without the affidavits.

The Fourth Amendment provides that "no Warrants shall issue, but upon probable cause . . . and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amnd. IV. The touchstone of the particularity requirement is whether the warrant ensures that "[a]s to what is to be taken, nothing is left to the discretion of the officer executing the warrant." Marron v. United States, 275 U.S. 192, 196 (1927); Andresen v. Maryland, 427 U.S. 463, 480 (1976); see United States v. Gomez-Soto, 723 F.2d 649, 643 (9th Cir.), cert. denied, 104 S. Ct. 2360 (1984). The majority, while acknowledging this fundamental principle, ignores its application in this case. A close review of the facts demonstrates the flagrant overbreadth of the warrant used by the agents to search Dr. Hayes's three medical offices.

The most obvious violation of the Fourth Amendment's particularity requirement is found

in the two search warrants covering more than 9,000 patient files at the Farmersville and Portersville medical offices. These warrants authorized the search of "patient logs, appointment books and other records . . . constituting evidence of illegal distribution of controlled substances." This provision is not reasonably specific because the officers executing the warrant must determine during the search whether a particular item "constitutes evidence" of illegal distribution.[3] In fact, this is exactly the type of warrant provision that this court has repeatedly struck down.[4]

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[3] Such a determination is especially problematic in this case because of the "medical exception" to the prohibition on prescription of controlled substances. A file indicating that Dr. Hayes prescribed a controlled substance would not necessarily establish a violation of the staute. The executing officers would have to determine if the prescription was "excessive" or for a "non-medical" purpose. In fact, the agents testified that they used their own judgment in determining what to seize from Dr. Hayes's offices.

[4] See, e.g., Gomez-Soto, 723 F.2d at 653-54 (invalidating warrant provision authorizing search of papers "evidencing failures to file currency transaction

The majority opinion winks at this glaring deficiency by merely quoting, without explaining, these provisions in its footnote.

Nor do the warrant provisions addressed in the text of the majority opinion pass constitutional muster. The warrants at issue in this case authorize the search of every patient file in all three of Dr. Hayes's offices. The broad language of the warrants encompasses about 8,000 files in the Porterville office, 1,500 files in the Farmersville office, and 1,000 files in the Ivanhoe office. The majority opinion concludes that these vast

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reports . . . ."); United States v. Cardwell, 680 F.2d 75, 76 (9th Cir. 1982) (search of corporate records "which are the fruits and instrumentalities, of violations of [federal tax law]."); VonderAhe v. Howland, 508 F.2d 364, 366-67 (9th Cir. 1974) (search of documents "used as a means of committing and constitute evidence" of federal tax offenses); see also United States v. Drebin, 557 F.2d 1316, 1322-23 (9th Cir. 1977) (search of "illegally reproduced" film), cert. denied, 436 U.S. 904 (1978); cf. Andresen, 427 U.S. at 480-81 (provision authorizing search of "other fruits, instrumentalities and evidence of a crime at this [time] unknown" upheld only because it accompanied a lengthy list of specified and particular items to be seized pertaining to specific property).

numbers are really insignificant, noting that the Court in Andresen acknowledged that in searches of voluminous records,"some innocuous documents will be examined, at least cursorily, in order to determine whether they are, in fact, amoung those papers authorized to be seized." 427 U.S. at 482 n.11. The Court in Andresen went on to state, however, that in such searches "responsible officials, including judicial officials, must take care to assure that they are conducted in a manner that minimizes unwarranted intrusions upon privacy." Id. In this case, an opportunity to minimize unwarranted intrusions readily presented itself to the agents and to the issuing Magistrate--the search could have been, but was not, restricted to the files pertaining to the particular patients or drugs referred to in the affidavits. I believe that "responsible" officials would have, at a minimum, limited the search warrant to Schedule II drugs, rather than to any controlled substance,

and the 58 suspect profiles, rather than to the 10,000 patient files.

Moreover, the failure to describe with particularity the items to be seized cannot be squared with this court's repeated pronouncements that a general description is not possible." Gomez-Soto, 723 F.2d at 654; United States v. Cardwell, 680 F.2d 75, 78 (9th Cir. 1982); see also VonderAhe, 508 F.2d at 370; accord United States v. Bright, 630 F. 2d 804, 812 (5th Cir. 1980). Although the government acknowledges that its investigation of Dr. Hayes focused on excessive prescription of Schedule II drugs, the warrant authorized a search of documents and patient files pertaining to every controlled substance, from Percodan to such commonly prescribed medications as Tylenol with codeine and Valium. Here, as in Cardwell, the results of the governments pre-search investigation "were not used to refine the scope of the warrant." See Cardwell, 680 F.2d at 78.[5]

The failure to limit the warrants so as to minimize intrusions upon patient's privacy interests is particularly troublesome because the documents to be searched were primarily medical records. Information contained in patient files is extremely personal and potentially embarrassing to innocent third parties. Unlike the cases cited by the majority, in which the searches

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5 The government admitted that it sought a warrant only because Dr. Hayes resisted its attempt to subpoena certain medical records. The government's failure to continue its investigation by way of subpoenas, however, does not necessitate the use of an overbroad warrant. "While we may not question the wisdom of using a warrant, as opposed to less intrusive methods available to [the government], we may demand that 'if such drastic procedure is to be availed of, it should be strictly limited as constitutionally required.' " Cardwell, 680 F.2d at 78 (quoting VonderAhe, 508 F.2d at 369) (citations omitted).

generally involved a narrow class of business transactions,[6] the search in this case encompassed personal medical history contained in thousands of patient files. The Magistrate's failure to narrow the scope of the search resulted in massive intrusions on personal privacy interests. Cf. United States v. Abrams, 615 F.2d 541 (1st Cir. 1980) (invalidating broad search of medical records); VonderAhe, 508 F.2d 364 (same).

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6 See Andresen, 427 U.S. at 466 (search of documents relating to sale of specified property); United States v. McClintock, 748 F.2d 1278, 1282 (9th Cir. 1984) (items and records from gemstone retailer), cert. denied, 106 S. Ct. 75 (1985); Gomez-Soto, 723 F.2d at 653 (business transactions by defendant and three corporations, records of international travel, documents indicating residence or citizenship, and handwriting samples); United States v. Offices Known As 50 State Distributing Co., 708 F.2d 1371, 1372 (9th Cir. 1983) ("invoices, sales orders", etc., from national supplier of advertising products), cert. denied, 465 U.S. 1021 (1984); United States v. Whitten, 706 F.2d 1000, 1008-09 (9th Cir. 1983) (records indicating ownership or occupancy of residence), cert. denied, 465 U.S. 1100 (1984); United States v. Tamura, 694 F.2d 591, 594 (9th Cir. 1982) (business records from television cable importer); United States v. Federbush, 625 F.2d 246, 251 (9th Cir. 1980) (documents and checks pertaining to a certain bank); United States v. Louderman, 576 F.2d 1383, 1386 (documents relating to the

Finally, the testimony of the executing officers establishes that the warrants failed to provide "reasonable guidelines" for the search of the thousands of medical files in this case. While the government's investigation focused on excessive prescription of Schedule II drugs, the breadth of the warrant and the number of medical files in the offices gave the searching officers no alternative but to exercise broad discretion in choosing which files to seize. According to an agent searching the 8,000 files in the Porterville office, anything within the confines of the offices was "fair game," and whether to search a particular file was "up to the discretion of the officer." In fact, the agent stated: "[p]ersonally, I was specifically looking for the substances Dialudid and Percodan."

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activities of a business involved in locating debtors); see also United States v. Pollock, 726 F.2d 1456, 1458 (9th Cir. 1984) (items used in methamphetamine manufacture).

He further admitted that "it was basically assumed that each officer was to use his common sense and judgment as to which file should be seized."[7] In fact, the agents soon called off their attempts to search all the medical records, and focused instead on certain patient files, and on a triplicate prescription log maintained by Dr. Hayes for Schedule II prescriptions. Thus, the overbreadth of the warrants in this case not only permitted discretionary rummaging and seizure, but in fact necessitated it.

The number of files searched, the general object of the search, and the nature of the information contained in those files all demonstrate that the "guidelines" contained in the warrants were simply not reasonable.

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[7] The lack of reasonable guidelines was also noted by other agents. The agents in charge of the Ivanhoe and Farmersville searches testified that although they were looking for documents indicating excessive prescription of Schedule II drugs, there were no specific guidelines by which they were to determine what to seize.

There is no valid excuse for the omission because the opportunity to provide reasonable guidelines was readily available to the government and the issuing Magistrate. Because reasonably specific guidelines were not provided, the warrants, in my view, do not even come close to satisfying the Fourth Amendment's particularity requirement. For the reasons stated above, I dissent.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee

v.

No.: 84-1276
D.C. No.:
Cr83-016 MDC

JUDE R. HAYES, Defendant-Appellant

ORDER
Filed October 1, 1986

Appeal from the United States District Court
for the Eastern District of California

Before: WALLACE, ANDERSON, and PREGERSON
Circuit Judges

Judges Wallace and Anderson have voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

Judge Pregerson has voted to grant the petition for rehearing and to accept the suggestion for rehearing en banc.

An active judge called for a vote on whether to rehear this case en banc. The matter failed to receive a majority of the votes of the active judges in favor of en banc rehearing. Fed. R. App. P. 35.

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.